

**PUBLIC VERSION**

**EXHIBIT A**

observations without providing any explanation of a linkage between them. These observations include: the existence of notoriety related to the Obama Image; the fact that sales increased in 2008 over the prior year levels; and deposition testimony from an accountant for One 3 Two, Mr. Van Berckelaer.

42. Additionally, Ms. Kedrowski bases her calculations of Indirect Revenue on the premise that “a portion of the revenue generated, based on the compound annual growth rates for Fairey and Obey Clothing, from non-Infringing Works-related merchandise and artwork, *may* be due to Fairey and Obey Clothing’s infringing actions” (*emphasis added*).<sup>47</sup> However, lacking from the Kedrowski Report is any substantive analysis which supports her hypothesis that a causal linkage between notoriety and any Indirect Revenue exists, or alternatively, between sales of Obama Merchandise and any Indirect Revenue. Further, Ms. Kedrowski does not cite to any evidence suggesting that Mr. Fairey’s notoriety, or the Obama Merchandise, made any substantial contribution to One 3 Two’s indirect profits, nor did she make any effort to quantify the percentage of indirect profits that may be attributed to the notoriety/Obama Merchandise. Given that there are many other factors that may be responsible for an increase in One 3 Two’s revenue, as I discussed below, I find no credible factual basis for Ms. Kedrowski’s conclusion.

43. Although I understand from Counsel that claims for indirect profits are “more frequently unsuccessful,”<sup>48</sup> I nevertheless have been asked by Counsel to evaluate Ms.

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<sup>47</sup> Kedrowski Report, p. 14.

<sup>48</sup> Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* §14.03[B][2][a] (Matthew Bender, Rv. Ed.).