

EXHIBIT A
TO CROWTHER DECLARATION
IN SUPPORT OF ONE 3 TWO, INC.'S
MOTION IN LIMINE NO. 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SHEPARD FAIREY and OBEY GIANT ART, INC.,

Plaintiffs,

v.

THE ASSOCIATED PRESS,

Defendant and Counterclaim Plaintiff,

v.

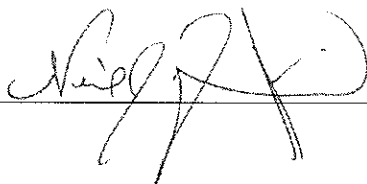
SHEPARD FAIREY, OBEY GIANT ART, INC., OBEY
GIANT LLC, STUDIO NUMBER ONE, INC., and ONE 3
TWO, INC. (d/b/a OBEY CLOTHING),

Counterclaim Defendants.

Civil Action No. 1:09-cv-01123-AKH

**EXPERT REPORT OF NEIL J.
ZOLTOWSKI
(FED. R. CIV. P. 26(a)(2)(B))**

Respectfully submitted this 2nd day of November 2010:



Confidential – Subject to Protective Order

EXHIBIT A

I. QUALIFICATIONS

1. I, Neil J. Zoltowski, am a Partner in the Boston, Massachusetts office of StoneTurn Group, LLP ("StoneTurn"). I provide financial and economic consulting services - including economic valuation of intellectual property such as patents, trade secrets, trademarks and copyrights - to counsel and client companies. I have earned the Accredited Valuation Analyst ("AVA")¹ and Certified Forensic Financial Analyst ("CFFA")² designations granted by the National Association of Certified Valuation Analysts ("NACVA").³ Additionally, I have earned the Certified Licensing Professional ("CLP")⁴ designation from the Licensing Executives Society USA and Canada, Inc. ("LES").⁵

2. A copy of my current curriculum vitae, which summarizes my qualifications and professional experience, and, a listing of my testimony over the preceding four years and publications over the preceding ten years, is attached as **Exhibit 1**. StoneTurn charges \$450 per hour for time I spend consulting and assessing damages and time that may be spent testifying related to my damages analysis. StoneTurn's fees are not contingent on the outcome of this matter, or on the opinions provided herein.

II. ASSIGNMENT

3. StoneTurn was retained by Caldwell Leslie & Proctor, PC ("Counsel") to assess the economic damages, if any, assuming that Counterclaim Defendant, One 3 Two, Inc. d/b/a Obey Clothing ("One 3 Two") is found liable for certain allegations asserted by Defendant and Counterclaim Plaintiff, the Associated Press ("AP"). I have been asked to opine as to the appropriate licensing fee for use of a photograph of then-Senator Barack Obama taken by a staff photographer of the AP in April 2006 (the "Obama Photo") related to the alleged copyright infringement by the Counterclaim Defendants, including Shepard Fairey, Obey Giant Art, Inc., Obey Giant LLC, Studio Number One, Inc, and One 3 Two.

1 NACVA trains and certifies AVAs to perform business valuations as a service to both the consulting community and the users of their services. Through training and rigorous testing, AVAs demonstrate they are qualified to provide capable and professionally executed valuation services. NACVA'S valuation designations are the only valuation credentials accredited by the National Commission for Certifying Agencies.

2 The CFFA credential is designed to provide assurance to the legal and business communities—the primary users of financial forensics services—that the designee possesses a level of experience and knowledge deemed acceptable by NACVA to provide competent and professional financial forensic support services. (www.nacva.com)

3 NACVA, an organization comprised of more than 7,000 CPAs and other valuation and consulting professionals, supports the users of business and intangible asset valuation services and financial forensic services, including damages determinations of all kinds and fraud detection and prevention, by training and certifying financial professionals in these disciplines. (www.nacva.com)

4 The CLP program is a professional designation intended to distinguish those who have demonstrated experience, proficiency, knowledge and exposure to licensing and commercialization of intellectual property through involvement in patenting, marketing, valuation, IP law, negotiation, and intellectual asset management. (www.licensingcertification.org)

5 Established in 1965, the LES is a professional society comprised of nearly 5,000 members engaged in the transfer, use, development, manufacture and marketing of intellectual property. LES is a member society of the Licensing Executives Society International, Inc., with a worldwide membership of over 12,000 members in 30 national societies, representing over 80 countries. (<http://www.lesusacanada.org/MainNav/AboutLES.aspx>)

Specifically, my opinion and supporting analysis relates to the appropriate licensing fee for any allegedly infringing promotional material or merchandise that was given away or sold by One 3 Two. Additionally, I have been asked to evaluate certain opinions and conclusions asserted by the AP regarding an appropriate license fee for use of the Obama Photo, as put forth in the Preliminary Expert Report of Kathleen M. Kedrowski, dated October 1, 2010 ("Kedrowski Report"). I have not been retained to offer any opinion as to liability in this matter.

4. While my work on this matter is on-going, this report summarizes my current opinions given the information available to date. I may consider any additional materials, if produced, and modify or supplement my analyses and opinions as necessary.

III. INFORMATION CONSIDERED

5. I considered information from a variety of sources in the course of my work. This includes certain information provided by the parties; court filings submitted by the parties; certain deposition testimony; and other information obtained by StoneTurn from public sources. The materials I have considered are listed in **Exhibit 2**, attached hereto.

6. In connection with my anticipated trial testimony in this action, I may create, from various documents produced in this litigation, demonstrative exhibits which refer or relate to the matters discussed in this report, or in my deposition testimony. I have not yet created any such exhibits as of the date of this report.

IV. PARTIES

7. I understand that the following entities and individuals are parties named in this litigation:

Shepard Fairey

8. Shepard Fairey is an artist based in Los Angeles, California. Mr. Fairey's work focuses on social and political subjects, frequently dealing in current events. His illustrations are created in a variety of media, including screen prints and stencil painting – and take a variety of forms including street art, commercial art and design, as well as fine art seen in galleries and museums all over the world.⁶

Obey Giant Art, Inc., Obey Giant LLC and Studio Number One, Inc. (collectively "Obey Giant")

9. The Obey Giant entities are all California corporations located in Los Angeles, California, and owned in whole or in part by Mr. Fairey and his wife, Amanda. Obey Giant primarily distributes Mr.

⁶ Amended Answer, Affirmative Defenses and Counterclaims of Plaintiffs and Counterclaim Defendants, October 16, 2009, p. 13.

Fairey's artistic works.⁷

One 3 Two

10. One 3 Two, which does business as Obey Clothing, is a California corporation located in Santa Ana, California. One 3 Two is the exclusive licensee of Obey Giant for the use of Mr. Fairey's trademarks and designs on clothing.⁸ It primarily sells men's and women's apparel and accessories based upon Mr. Fairey's designs to distributors and third-party retail stores, as well as through its own online presence.⁹

The AP

11. The AP is a New York corporation with its headquarters and principal place of business in New York, New York.¹⁰ The AP is a news organization that serves daily newspaper, radio, television and online customers with coverage in various media and news in various formats. The AP consists of various businesses, including a digital photo network, online news service, a television news service, radio network, and a commercial digital photo archive.¹¹

V. BACKGROUND AND EVENTS

12. I understand that in April 2006, then-Senator Barack Obama appeared at an event at the National Press Club related to the humanitarian crisis in the Darfur region of Africa. At this event, a photographer for the AP, Mannie Garcia, took the Obama Photo, shown below:¹²

⁷ *Amended Answer, Affirmative Defenses and Counterclaims of Plaintiffs and Counterclaim Defendants*, October 16, 2009, pp. 12-13.

⁸ *The Associated Press's First Amended Answer, Affirmative Defenses and Counterclaims*, November 11, 2009, p. 16; *Answer and Affirmative Defenses by Counterclaim Defendant One 3 Two, Inc., d/b/a Obey Clothing to the Associated Press's First Amended Answer, Affirmative Defenses and Counterclaims*, December 4, 2009, p. 5; and Deposition of Regan Donald Juncal, March 23, 2010 ("Juncal Deposition"), p. 43.

⁹ Obeyclothing.com; Deposition of Adam Van Berckelaer, March 11, 2010 ("Van Berckelaer Deposition, Vol. I"), p. 88; and Juncal Deposition, pp. 199-200. (I understand that Obey Clothing's website is operated by a separate entity, StoreFront E, but is under the same ownership as Obey Clothing.)

¹⁰ *The Associated Press's First Amended Answer, Affirmative Defenses and Counterclaims*, November 11, 2009, p. 16.

¹¹ www.onesource.com.

¹² *Amended Complaint for Declaratory Judgment and Injunctive Relief*, November 13, 2009, p. 4; and *Answer, Affirmative Defenses and Counterclaims of Defendant, The Associated Press*, March 11, 2009, pp. 42-43.



13. I understand that by the fall of 2007 Mr. Fairey had become a supporter of then-Presidential candidate Barack Obama. Subsequently, in or around January 2008, Mr. Fairey created a series of screen-print posters which included an abstracted graphic rendition of Mr. Obama gazing up and to the viewer's right, colored in a palette of red, white, and blue (the "Obama Image"). Below this graphic, in capital letters, were words such as "progress" and "hope." An example of one of Mr. Fairey's creations is shown below.¹³



14. I understand that in creating the illustration of Mr. Obama for these works, Mr. Fairey used the Obama Photo as a reference. I also understand that during and after the 2008 presidential campaign, Mr. Fairey created other works which utilized the Obama Image. These works contained the same abstracted graphic rendition; however, the works included different layouts and words, such as "Be The Change"

¹³ *Amended Complaint for Declaratory Judgment and Injunctive Relief*, November 13, 2009, pp. 3-5; and *Answer, Affirmative Defenses and Counterclaims of Defendant, The Associated Press*, March 11, 2009, pp. 42-43.

and "Yes We Did."¹⁴

15. I understand that One 3 Two was (and continues to be) the exclusive clothing distributor of Mr. Fairey's designs. I further understand that in or around February 2008, One 3 Two was contacted by Urban Outfitters, a third-party retail clothing store, and the parties discussed potentially applying Mr. Fairey's Obama Image to t-shirts which would be offered for sale in Urban Outfitters' retail stores. Subsequently, from approximately March 2008 through August 2009, One 3 Two sold a variety of styles of apparel that contained the Obama Image to Urban Outfitters, as well as other customers. Additionally, during this time, One 3 Two donated certain items containing the Obama Image, such as t-shirts, postcards, posters, flyers and window graphics, to various entities in support of Mr. Obama's presidential campaign.¹⁵

16. I understand the AP alleges that the Obama Photo was the basis for the Obama Image, and that the inclusion of the Obama Image on certain of One 3 Two's products constitutes direct and/or contributory copyright infringement. I also understand the AP is seeking the actual damages it has allegedly sustained (including attorneys' fees), as well as any gains, profits and advantages obtained by One 3 Two.¹⁶

VI. OPINION AS TO THE APPROPRIATE LICENSE FEE

17. It is my understanding that a copyright owner is entitled to the following remedies for infringement of its copyright:

- actual damages and any additional profits of the infringer; or
- statutory damages.¹⁷

I understand that the recovery of actual damages specifically relates to "the actual damages suffered by him or her as a result of the infringement."¹⁸

18. It is my understanding that the Second Circuit Court of Appeals (along with numerous other jurisdictions) has ruled that Section 504(b) of the Copyright Act¹⁹ permits a copyright owner to recover actual damages for the fair market value²⁰ of a license covering a defendant's infringing use.²¹

¹⁴ *Amended Complaint for Declaratory Judgment and Injunctive Relief*, November 13, 2009, pp. 4-7.

¹⁵ Juncal Deposition, pp. 79-90 and Exhibit 4; and OTT 027506.

¹⁶ *The Associated Press's First Amended Answer, Affirmative Defenses and Counterclaims*, November 11, 2009, pp. 60-61.

¹⁷ 17 U.S.C. §504(a).

¹⁸ 17 U.S.C. §504(b).

¹⁹ 17 U.S.C. §504(b).

²⁰ Fair market value has been defined as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts."

19. In this matter, I understand the AP has asserted that it has suffered damages due to Counterclaim Defendants' use of the Obama Photo without compensating it for that use. I have been asked by Counsel to assess the appropriate licensing fee for use of the Obama Photo under the assumption that the Counterclaim Defendants are found to infringe the AP's copyright for that image. This section outlines my opinion as to the appropriate licensing fee for use of the Obama Photo related to any promotional material or merchandise that was given away or sold by One 3 Two.

AP's Licensing Practices for its Images

20. I understand that the AP licenses two types of images – rights managed and royalty-free. Rights-managed images are high-quality products with the structure of the license and the amount of the fee based on the specific use. The fee is calculated from several factors such as print run, size, placement, duration of use, and geographic distribution.²² Any images in which the AP owns the copyright would be considered a rights managed image and licensed under that framework. In contrast, royalty-free images can be used multiple times for multiple projects without paying additional fees and pricing is not based on the specific use but solely on the size of the product needed.²³

21. I understand that AP's licensing practices for its images are in line with its competitors in the industry. In fact, I understand that AP hired Farah DeGrave, currently its Manager for Sales Operations, in October 2006 from Getty Images, one of AP's largest competitors in the market for licensing images, to specifically look at how AP was licensing and pricing its images.²⁴ As part of her work developing the image licensing program, a pricing guide was developed to assist sales representatives with pricing images within industry standards.²⁵ I also understand that AP sales representatives may even utilize the Getty Images website to assist with pricing if for some reason they are unable to access the AP's pricing guide (*e.g.*, at a client site).²⁶

22. I understand that the AP has tried to push a royalty based license (*i.e.*, a running royalty) on

United States v. Cartwright, 411 U.S. 546, 551 (1973) citing the United States Treasury Regulations (Treas. Reg. 20.2031-1 (b)). A similar definition exists in the Internal Revenue Service Revenue Rulings (IRS Rev. Rul. 59-60).

21 "...The decisions of this and other courts support the view that the owner's actual damages may include in appropriate cases the reasonable license fee on which a willing buyer and a willing seller would have agreed for the use taken by the infringer." (*On Davis v. the Gap, Inc.* 246 F.3d 167 (2nd Cir. 2001) citing a number of additional case decisions.)

22 I understand that the AP's pricing framework for individual images is not demand based. That is, prices do not rise for an individual image if there is increased demand for that specific individual image. (Deposition of Farah DeGrave, March 23, 2010 ("DeGrave Deposition"), pp. 156-157.)

23 DeGrave Deposition, pp. 27-30, 57-59, 156-157 and Exhibit 3.

24 DeGrave Deposition, pp. 13, 64-65, 103-108.

25 I understand the pricing guide was created in the 2008 / 2009 timeframe and specifically sets "standard" prices for images based upon certain criteria. (DeGrave Deposition, pp. 64-67, 83-84, 113, 131.) The pricing guides I have reviewed appear to relate to publishing and editorial use across various mediums (*e.g.*, books, magazines, internet, television), as well as use in museum displays. (Deposition of Kenneth J. Dale, March 26, 2010 ("Dale Deposition"), Exhibits 8 and 9.)

26 DeGrave Deposition, p. 133, 138-139.

derivative work²⁷ merchandising deals.²⁸ However, I have seen no information to support that the AP has ever entered into a licensing agreement with a royalty based structure. Rather, the information I have reviewed demonstrates that AP has typically utilized a fixed flat fee or lump sum approach to licensing its images.

Relevant Licensing Transactions

23. In this section, I discuss relevant licensing transactions related to the use of images from the AP (including the Obama Photo) and Getty Images for various purposes. These licenses are also summarized in **Exhibit 3**.

24. Since the National Press Club event in April 2006 at which the Obama Photo was taken, the AP has licensed a number of images that were shot at the event, including the Obama Photo.²⁹ As of March 30, 2010, images from the April 2006 National Press Club event were downloaded 393 times for revenue totaling \$13,447³⁰ at individual license fees ranging from \$35 to \$1,100 depending on the use.

25. In May 2007, Swindle Magazine, a pop culture and lifestyle publication,³¹ and the AP entered into a license for use of an image of American scholar Dr. W.E.B. Du Bois talking with Dr. Kwame Nkrumah at the World Peace Conference in Ghana. This agreement specified a payment of \$150 for one time non-exclusive, editorial use as a ¼ page inside Swindle magazine, with a circulation of 80,000 copies only.³²

26. In August 2007, Time Out Chicago, a media source for arts, entertainment and culture in the city of Chicago,³³ and the AP entered into a license for use of the Obama Photo.³⁴ The agreement specified a payment of \$100 for “U.S. English language rights” and “non-exclusive one time editorial use only” in a feature spot.³⁵

27. In August 2007, Time Out Chicago and the AP entered into another license for use of a photograph of television host Willie Revillame. The agreement specified a payment of \$75 for “U.S.

27 “A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’” (17 U.S.C. §101.) I understand that the Obama Image would be considered a derivative work of the Obama Photo.

28 DeGrave Deposition, pp. 115-116 and Exhibit 12.

29 Deposition of Jim Gerberich, March 31, 2010 (“Gerberich Deposition”), p. 99.

30 Gerberich Deposition, Exhibits 23-A.

31 <http://swindlemagazine.com>.

32 FAIREY 86621-22.

33 <http://chicago.timeout.com>.

34 DeGrave Deposition, pp. 143-144 and Exhibit 16.

35 DeGrave Deposition, Exhibit 16.

English language rights” and “non-exclusive one time editorial use only.”³⁶

28. In December 2007, Swindle Magazine, and the AP entered into a license for use of an image of Coup leader Joseph Desire-Mobutu in Leopoldville, Congo. This agreement specified a payment of \$175 for one time, non-exclusive, editorial use inside Swindle magazine, with a circulation of 80,000 copies only.³⁷

29. In January 2008, Obama for America³⁸ and the AP entered into license agreement for one-time, non-exclusive rights to a photo of President Obama during a campaign stop in Iowa for use in up to 5,000 retail posters for a sum of \$550.³⁹

30. In February 2008, Black Dog & Leventhal, a publisher based in New York,⁴⁰ and the AP entered into a license that specified a payment of \$3,000 for “world rights all languages” for use of 72 images of Barack Obama in the biography titled: “Hopes and Dreams: The Story of Barack Obama”⁴¹ – or approximately \$42 per image on average.

31. In July 2008, Obama for America and the AP entered into a license agreement for one-time, non-exclusive rights to a photo of President Obama during a campaign stop in Iowa for editorial use as the cover to the book “Change We Can Believe In” for a sum of \$1,875. For an additional amount totaling \$1,406.25 (or 75% of the original fee), it appears that world distribution rights for use of the image in up to 300,000 book prints in all languages were also granted. The license also granted substantial advertising and promotional rights including: “the right to use, publish, and reproduce the Photograph, in whole or in part, in composite or distorted form, color or character, throughout the world, for the full term of copyright thereof, in any and all transmission, now known or hereinafter developed, in connection with the publication of the Book, [CHANGE WE CAN BELIEVE IN], all edition, derivations and subsidiary uses of the Book, the advertising, publicity and promotion of the Book, and any Obama for America campaign-related uses.”⁴²

32. In August 2008, Obama for America and the AP entered into a license agreement for one-time, non-exclusive rights to a photo of President Obama speaking in Moscow for editorial use in the interior of up to 300,000 “Change We Can Believe In” book prints, including world rights and all languages, for a

36 DeGrave Deposition, Exhibit 6.

37 FAIREY 87113-34.

38 Obama for America, the predecessor of Organizing for America, is an organization that supported Barack Obama during the 2008 presidential campaign. (www.barackobama.com)

39 AP 0010683-84.

40 www.blackdogandleventhal.com.

41 DeGrave Deposition, Exhibit 17.

42 AP 0010699-702.

sum of \$300.⁴³

33. In October 2008, Flashbags, a maker of handmade bags based in Burlington, Vermont,⁴⁴ and the AP entered into a license agreement for use of an image of President Obama waving to the crowd following his address at a rally in Wisconsin. The agreement specified a payment of \$525 for a “non promotional bag design, up to 5000 pieces, 1 year production rights granted, no additional rights granted.”⁴⁵

34. In December 2008, Obey Giant Art and the AP entered into a license agreement for use of a photograph of a Palestinian woman peering from a balcony (“Palestinian Woman Photo”). The agreement consisted of two licensing components:⁴⁶

- Payment of \$590 for “one time non-editorial usage, up to 5000 t-shirts, 1 year distribution only, no additional rights granted”⁴⁷; and
- Payment of \$387 for “one time non-editorial usage, up to 500 pieces for use on limited edition illustrated prints, up to 5 years distribution, no additional rights granted.”

35. In March 2009, Obey Giant Art and Getty Images entered into a license agreement for use of an image of Johnny Cash. The agreement specified a payment of \$510 for non-exclusive U.S. rights to use the image in up to 500 full sized retail posters over a 1 year period.⁴⁸

36. In the June/July 2009 timeframe, Rolling Stone magazine and the AP entered into a license for rights to a photograph of President Obama that specified a payment of \$350 for non-exclusive, one-time editorial use as a derivative work for the cover of Rolling Stone magazine’s domestic and foreign editions. I also understand the AP quoted a price of \$250 for domestic rights only.⁴⁹ I understand the AP’s pricing for the use of the photo was based in part on the Rolling Stone’s circulation and on the use of the photo to create a derivative work. I also understand the price would have been higher had Rolling Stone used the photo “as is / untouched.”⁵⁰

37. In July 2009, Flashbags and the AP entered into a license for use of a photograph of Michael

43 AP 0010703-04.

44 <http://flashbagsonline.com>.

45 AP 0002615-16.

46 DeGrave Deposition, Exhibit 13.

47 I understand the AP quoted a price of \$550.00 for rights up to 1,000 t-shirts and \$590.00 for rights up to 5,000 t-shirts. I understand the AP’s representative who testified on this topic stated that this pricing “looks fine” and was “appropriate”. (DeGrave Deposition, pp. 126-128 and Exhibit 13.)

48 FAIREY 118153-55.

49 DeGrave Deposition. Exhibits 8-10.

50 FAIREY 106661-62.

Jackson. The agreement specified a payment of \$525 for a “non promotional bag design, up to 2500 pieces, 1 year production rights granted, no additional rights granted.”⁵¹

38. In September 2009, New York magazine and the AP entered into a license for rights to the Obama Photo that specified a payment of \$850 for non-exclusive, one-time editorial use as a derivative work for a full page cover of New York magazine. The license also provided for rights to use the Obama Photo as a full page on the interior of the magazine for \$350.⁵²

39. In December 2009, Obey Giant Art and Getty Images entered into a license agreement for use of an image of John Lennon and Yoko Ono at London's Heathrow Airport. The agreement specified a payment of \$480 for non-exclusive U.S. rights to use the image in up to 500 full sized retail posters over a 2 year period.⁵³

40. Also, I understand that the AP also entered into an agreement with Soup Kitchen International, Inc. (the restaurant owned by the gentleman referred to as the “Soup Nazi” in the Seinfeld sitcom) in April 2006 for a license fee of \$30,000 for “all industry, exclusive rights to Soup Kitchen International, Inc., its subsidiaries and affiliates for all advertising media rights, in perpetuity, predated to first date of appearance.” The AP retained rights to license the photo for editorial use only and could not grant permission for any commercial purposes other than those granted to Soup Kitchen International, Inc.⁵⁴

41. The agreements discussed above demonstrate that the AP licenses its images on a fixed fee or lump sum basis. Based on the information I have reviewed, including the information cited in the Kedrowski Report that has been produced in this litigation, there is no evidence to support that the AP has ever entered into a royalty based license for use of its images.

Nature of the License Agreements between the Parties for Use of the Obama Photo

42. I understand that the AP licenses its rights managed images on an “a la carte” basis related to “use.” As a result, the parties would have likely entered into multiple licenses (at various times) for each particular use of the Obama Photo, given that Shepard Fairey and One 3 Two may not have known all of the planned uses of the Obama Image at the time of its creation in or around January 2008.⁵⁵ These licenses would have been priced based on the following considerations and criteria:

51 DeGrave Deposition, Exhibit 11.

52 AP 0002744-45.

53 MCCORMACK 0000934-35.

54 AP 0002636. This license fee is the largest amount I have seen based on the information I have reviewed. Given the considerations and criteria of the transaction (i.e., exclusive use, full advertising media rights, no other commercial uses granted), this would serve as an upper bound for any licensing transaction between the parties for use of the Obama Photo. However, I understand the parties in this instance were only seeking non-exclusive rights related to the sales and giveaways of certain promotional merchandise for a limited period of time.

55 DeGrave Deposition, pp. 36, 132, 137-138, 147-148, 198-200.

- Non-editorial use – *i.e.*, commercial rights for promotional and merchandising use;
- Non-exclusive rights;
- Rights for use as a derivative work – *i.e.*, the Obama Image;
- U.S. English language rights;
- Rights to unit volumes based on the amounts that I understand One 3 Two created of apparel and print material (to sell, advertise or to use as giveaways) which contained the Obama Image
 - T-Shirts totaling 236,625 units;⁵⁶
 - Full-page magazine advertisement in each of the publications below;
 - Nylon Guys Magazine⁵⁷
 - YRB Magazine⁵⁸
 - Complex Magazine⁵⁹
 - Antenna Magazine⁶⁰
 - Flyers from Alloy Media and Marketing (which I have estimated at approximately 90,000 units) for which the production costs were \$5,700;⁶¹
 - Postcards from Integrity Print for the Democratic National Convention totaling 30,000 units;⁶²
 - Obama Hope Posters from Heinz Weber, Inc. totaling 70,000 units;⁶³ and
 - Window graphics from Monster Media totaling 17 units.⁶⁴
- Rights for distribution over certain durations of time

56 OTT 027506. (I understand that an increase in the amount of units will increase the price of a license. See DeGrave Deposition, pp. 102, 108-109, 113 and Dale Deposition, Exhibits 8 and 9.)

57 OTT 000051-53.

58 OTT 000068.

59 OTT 000069-72.

60 OTT 000083-86.

61 OTT 000087-88.

62 OTT 000054-55.

63 OTT 000057-59. (I understand the posters were related to (and created for purposes of) sales and giveaways of t-shirts containing the Obama Image as well as for promotional purposes related to the Obama presidential campaign.)

64 OTT 000060-65, 76-78 and 79-82. (I understand the window displays were related to (and created for purposes of) sales and giveaways of t-shirts containing the Obama Image.)

- T-Shirts/Posters/Window Displays: The Obama Image was created in February 2008 and merchandise containing the Obama Image was sold or given away during the period March 2008 - August 2009.
- Magazine Advertisements: Each of the magazines in which advertisements were placed are distributed as follows –
 - Antenna Magazine – Quarterly (4 issues per year)
 - Nylon Guys Magazine – Bi-Monthly (6 issues per year)
 - YRB Magazine – Bi-Monthly (6 issues per year)
 - Complex Magazine – Bi-Monthly (6 issues per year)
- Postcards/Flyers: The Obama Image was created in February 2008 and I understand these materials were utilized during the presidential campaign culminating in the inauguration of President Obama in January 2009.

Relative Negotiating Positions of the Parties

43. As discussed, the AP has typically utilized a fixed flat fee or lump sum approach based on the specific use when licensing its images. In this instance, the licenses would employ a similar license structure. This is consistent with the numerous licenses entered into by the AP for the Obama Photo as well as additional photos of President Obama and other images, as discussed in detail above. Additionally, such a structure is consistent with the AP's pricing guides and the testimony proffered by Ms. DeGrave regarding the AP's licensing practices. Further, Ms. DeGrave testified that she was brought in to bring the AP's licensing practices in line with the industry based on her experience at Getty Images, one of AP's largest competitors in the market for licensing images. In fact, as Ms. DeGrave testified, the AP even utilizes the Getty Images website to assist with pricing if the AP pricing guide is inaccessible to the AP's sales representatives at that particular time. I have also previously summarized (above) certain licensing transactions involving Getty Images and each of these utilized a fixed fee structure. Moreover, the Getty Images website allows a user to review its catalog of images and obtain the fixed fee price for the use of an image under various conditions and criteria.⁶⁵ Based on this information, the AP would have entered into fixed fee licensing arrangements with Shepard Fairey (and One 3 Two) based on its typical licensing practices.

44. In contrast, Shepard Fairey and One 3 Two would have had information, based on their prior experience and licenses with the AP, as to the AP's licensing practices for its images. Additionally,

⁶⁵ www.gettyimages.com.

Shepard Fairey and One 3 Two certainly would have been able to research the licensing practices of others in the industry. With this information, Mr. Fairey and One 3 Two would have understood that the AP (as well as others in the industry) licenses images using a fixed fee structure based on the type and extent of use. Additionally, Mr. Fairey and One 3 Two could have easily sought to use a different photo on which Mr. Fairey could have based his artwork for these designs. I understand Mr. Fairey identified the Obama Photo as a “suitable” image for use on this project through searches on Google Images over a two day period in late January 2008.⁶⁶ I have seen no information to suggest that the Obama Photo has been determined to be the sole image from which Mr. Fairey had to base his artwork, and I understand Mr. Fairey and One 3 Two could have easily located another “suitable” image for this project. Based on this information, Mr. Fairey and One 3 Two would have been unwilling to enter into a license agreement at a high fixed-fee dollar amount or under a structure that incorporated some type of running royalty requirement.

45. Additionally, while I understand that One 3 Two did enter into certain licenses that included fees as a percent of revenue (e.g., Al Rockoff, Martha Cooper),⁶⁷ these licenses are not instructive as to the appropriate licensing fee between the AP and Shepard Fairey / One 3 Two in this instance as they are not representative of the AP’s typical licensing practices and procedures for its images. As discussed, based on the information reviewed, including the information cited in the Kedrowski Report that has been produced in this litigation, there is no evidence to support that the AP has ever entered into a royalty based license for use of its images. Therefore, the AP’s license agreements (as detailed above), including agreements with Shepard Fairey (among many others), provide the most relevant and useful information in the determination of the appropriate license structure between these parties related to these particular uses.

Appropriate Licensing Fees for Use of the Obama Photo

46. I understand that if the Counterclaim Defendants had contacted AP and provided specific information (such as the considerations and criteria outlined in the section above) based on the usage of the Obama Photo, AP “would have gone to [its] price book and come up with a price.”⁶⁸ Based on the analysis and information outlined above, it is my opinion that the parties would have entered into fixed fee (or lump sum) licenses at various times for each particular use of the Obama Photo, given that Shepard Fairey and One 3 Two likely would not have known all of the planned uses of the Obama Image

66 Deposition of Frank Shepard Fairey, March 18, 2010 (“Fairey Deposition, Vol. IIF”), pp. 683-684, and 794.

67 Deposition of Christopher Broders (“Broders Deposition”), March 16, 2010, pp. 145-147, 163-164, Exhibit 10 and Exhibit 13.

68 DeGrave Deposition, pp. 202, 207.

at the time of its creation in or around January 2008.⁶⁹

47. As previously discussed, the pricing guides I have reviewed appear to relate to publishing and editorial use across various mediums (*e.g.*, books, magazines, internet, television) and use in museum displays.⁷⁰ I have utilized these pricing guides to assist in the determination of the relative price ranges the AP would have charged for the various uses of the Obama Photo as detailed above.⁷¹ A copy of the pricing guide I utilized is attached as **Exhibit 4** to this report. In addition, I have also utilized certain relevant license agreements (outlined above) and the Getty Images website⁷² to assist in this determination.⁷³

- **T-Shirts**

The parties would have entered into license agreements for the Obama Photo based on the considerations and criteria above for rights to produce up to 250,000 t-shirts. The parties would have likely entered into an initial license (“Initial T-Shirt License”) for rights to create a nominal amount of t-shirts (*e.g.*, 5,000) and then would have entered into a subsequent license (“Subsequent T-Shirt License”) for rights to create the additional units.

The licenses entered into between the parties would have been similar to the license entered into between the AP and Obey Giant Art for rights to the Palestinian Woman Photo, as both were for non-editorial use and both related to the creation of a derivative work that was to be included on t-shirts. Additionally, the Initial T-Shirt License would have been for rights to create a similar number of units. However, the Subsequent T-Shirt License would differ from the Palestinian Woman Photo license based upon (i) the rights granted for the duration of distribution (*i.e.*, 1 year for the Palestinian Woman Photo versus an assumed 2 years for the Subsequent T-Shirt License) and (ii) the rights granted as to the number of units (*i.e.*, 5,000 units for the

⁶⁹ It should also be noted that a fixed flat fee or lump sum approach is consistent with the expert opinion of John Jarosz, as discussed in his report dated October 1, 2010 (“Jarosz Report”), which he issued on behalf of Mr. Fairey and Obey Giant in this matter.

⁷⁰ Dale Deposition, Exhibits 8 and 9.

⁷¹ I have utilized the pricing guide produced as Exhibit 8 to the Dale Deposition for purposes of my analysis. This pricing guide appears to be the most recent version based on the file name and the pricing within the guide as compared with Exhibit 9 to the Dale Deposition.

⁷² I have utilized the current pricing from Getty Images website for purposes of this analysis under the assumption that Getty Images’ pricing has not changed materially since the time period when the parties would have entered into these license agreements. The Getty Images agreements discussed above (*i.e.*, Johnny Cash, John Lennon) provide support for this assumption. Additionally, a search of the Getty Images website under the considerations and criteria similar to the Palestinian Woman license results in the exact same price of \$590 (see footnote 74).

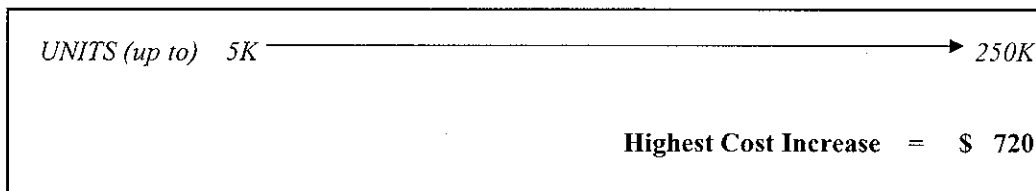
⁷³ As previously discussed, I understand that AP sales representatives may utilize the Getty Images website to assist with pricing if for some reason they are unable to access the AP’s pricing guide. (DeGrave Deposition, pp. 133, 138-139.)

Palestinian Woman Photo license versus ~230,000 units for the Subsequent T-Shirt License).

Based upon my analysis regarding the appropriate license fee related to the Initial T-Shirt License, it is my opinion that the license fee would have been priced similarly to the Palestinian Woman Photo license, or at \$590.⁷⁴

I analyzed the pricing for the Subsequent T-Shirt License fee in two ways.

First, using the AP pricing guide available (as shown in **Exhibit 4**), I quantified the maximum incremental dollar increases by unit threshold amounts from 5,000 units up to 250,000 units.⁷⁵ In other words, based on the AP pricing guide, I ascertained the highest possible increase in a license fee for an increase in total units created from the 5,000 unit threshold (*i.e.*, the amount for the initial license) to the 250,000 unit threshold (*i.e.*, the amount necessary under a subsequent license for the remaining t-shirts), which resulted in \$720, as specified below.



I applied this \$720 highest possible cost increase to the \$590 price paid under the Palestinian Woman Photo license given the similarities between the two licenses – *i.e.*, the Subsequent T-Shirt License and the Palestinian Woman Photo license. This resulted in an amount totaling \$1,310.⁷⁶

Next, I also analyzed the pricing for the Subsequent T-Shirt License fee using the AP pricing guide to assess a comparable license fee for the t-shirts. I was unable to identify a comparable category based on the AP pricing guide. However, I reviewed the AP's pricing guide to determine the maximum fee that could be identified within

74 I also utilized the Getty Images website to assess the price of a license under the considerations and criteria similar to the Palestinian Woman license – *i.e.*, one year, non-exclusive U.S. rights to make up to 5,000 t-shirts for retail use to promote political views. For this exercise, I performed a search for "president" under Getty's rights managed creative stock image gallery. I chose two separate photos – one of Former President George W. Bush (Image #82111091) and one of Former President Bill Clinton (Image #200126557-001). This exercise resulted in the exact same price as the fee for the Palestinian Woman license of \$590, as shown in **Exhibit 5-A**. This also provides additional support regarding the similarities between the licensing programs for both the AP and Getty Images. (www.gettyimages.com)

75 Dale Deposition, Exhibit 8. (See line item for Editorial Book Front Cover, Wrap Around, Electronic Included.)

76 As stated in the Jarosz Report, "analysis of the AP pricing guides indicates that the price for the highest volume license differs from the price for the lowest volume usage in any given application by a factor of less than three." (See Jarosz Report, p. 32 and Tab 13) Applying a multiplier of three (based on Mr. Jarosz's analysis) would result in a license fee totaling \$1,770 (*i.e.*, \$590 x 3).

the guide for *any* use of an image for up to 250,000 units. This exercise resulted in an amount totaling \$2,030, which would represent the maximum license fee based on the information available. This payment amount relates to the use of an image as a wrap-around, front cover on an editorial book for up to 250,000 units, based on the license category selected.⁷⁷

Lastly, I utilized the Getty Images website⁷⁸ to assess the price of a license for an image⁷⁹ under the considerations and criteria similar to this license – *i.e.*, non-exclusive U.S. rights to make up to 250,000 t-shirts for retail use to promote political views.⁸⁰ This exercise resulted in a price of \$1,435, as shown in **Exhibit 5**.

Based upon my analysis regarding the appropriate license fee related to the Subsequent T-Shirt License, it is my opinion that the fee would have ranged from \$1,310 to \$2,030 and would have likely been \$1,435.

- **Advertisements (Magazines)**

One 3 Two paid approximately \$22,000 for advertisements in four magazines that contained the Obama Image. The parties would have likely entered into one license for the Obama Photo given the relatively brief time period between the published advertisements. The license would have been based on the considerations and criteria detailed previously for rights to produce a full-page advertisement for use in the magazines (as listed below).⁸¹

- **Antenna Magazine** – Antenna magazine is a nationally distributed men’s gear guide and lifestyle magazine located in New York, New York.⁸²
- **Nylon Guys Magazine** – Nylon Guys magazine, published by Nylon Holding, Inc., is an independent magazine based in New York, New York that focuses on fashion, music and lifestyle. It is distributed nationally, primarily to an 18 to 35

77 Dale Deposition, Exhibit 8. See line item for Editorial Book Front Cover, Wrap Around, Electronic Included, Up to 250,000 Units.

78 It is my understanding that the Getty Image’s website will provide prices for use of its creative images. However, I understand one must contact a Getty Images sales representative for license rights to its editorial images.

79 I performed a search for “president” under Getty’s rights managed creative stock image gallery. I chose two separate photos – one of Former President George W. Bush (Image #82111091) and one of Former President Bill Clinton (Image #200126557-001) for this exercise. (www.gettyimages.com)

80 The Getty Image’s website does not allow for pricing at a tier of up to 250,000 units for this type of use, but only at tiers of 100,000 units and 500,000 units. I utilized the 500,000 unit tier and assumed a two year duration of use for purposes of this analysis.

81 Broders Deposition, pp. 212-215.

82 Broders Deposition, p. 214; and www.antennamag.com.

year-old demographic.⁸³

- **YRB Magazine** – YRB, or Yellow Rat Bastard, owns retail stores located New York, New York. They also produce an associated magazine under the same name which is distributed nationally.⁸⁴
- **Complex Magazine** – Complex magazine, part of the Complex Media Network, is a nationally distributed men’s lifestyle magazine based out of New York, New York.⁸⁵

As discussed previously, Rolling Stone Magazine paid \$350 to the AP for rights to a photograph of President Obama⁸⁶ and New York magazine paid \$850 for rights to the Obama Photo. Both were for non-exclusive, one-time editorial use as a derivative work for the cover of each magazine.⁸⁷ Additionally, New York magazine (as part of its license with the AP) did pay \$350 for rights to use the Obama Photo as a full page on the interior of the magazine.⁸⁸

The Rolling Stone magazine and New York magazine licenses are comparable because the license in this instance would be for a derivative work (*i.e.*, the Obama Image), interior placement, and domestic distribution rights. In contrast, the license would not be for a cover shot or editorial use (but rather would be placed as an advertisement on the interior of the magazine), and none of the magazines were as widely circulated as either Rolling Stone or New York magazine.⁸⁹

It is my opinion that the license fees paid by Rolling Stone and New York magazine under these licenses serve as a reasonable guide for the license fee that would have been paid in this instance for rights to publish a full-page advertisement in each of the

83 Broders Deposition, p. 213; and www.nylonguysmag.com.

84 Broders Deposition, p. 213; and www.yrbnyc.com.

85 Broders Deposition, p. 213; and www.complex.com.

86 Rolling Stone’s license granted rights for the magazine’s domestic and foreign editions and I understand the AP quoted a price of \$250 for domestic rights only. (DeGrave Deposition, Exhibits 8-10.)

87 I understand the AP’s pricing for the Rolling Stone’s use of the photo was based in part on the Rolling Stone’s circulation and on the use of the photo to create a derivative work. I also understand the price would have been higher had Rolling Stone used the photo “as is / untouched.” (FAIREY 106661-62.)

88 It is unclear if these rights were for use to create a derivative work. (AP 0002744-45.) However, I understand that use of the photo “as is / untouched” would command a higher fee. (FAIREY 106661-62.)

89 I understand Rolling Stone magazine has a circulation that has ranged from 1.4 million in 2008 to more than 1.5 million as of mid-2010. (“A Magazine Back on a Roll,” New York Times, Jeremy W. Peters, June 27, 2010.) In addition, I understand New York magazine’s circulation was slightly higher than 400,000 in 2008 and 2009. In contrast, for example, I understand the circulation for “Nylon” totaled 165,587 in 2009. It is unclear if this circulation relates to all of the magazines published by Nylon Holding, Inc. or for one specific magazine published by Nylon Holding, Inc. (Magazine Publishers of America, Fact Sheet of Average Circulation 2009.)

four magazines listed below. I have assumed that the parties would have likely entered into one agreement covering the entire circulation,⁹⁰ given the relatively brief time period between the published advertisements. Since Rolling Stone magazine's circulation is greater than 1.5 million and New York magazine's circulation is greater than 400,000, it is plausible that a license fee ranging from \$250 to \$850 may be appropriate to cover a license for the entirety of the circulation for all four magazines combined. However, I understand that a "promotional" license would increase the cost of the license as compared to a license for editorial use.⁹¹ Therefore, I have applied this range of license fees to each of the four magazine advertisements to quantify an upper bound under this component of the pricing analysis – *i.e.*, \$1,000 (4 x \$250) based on the Rolling Stone license for domestic rights to \$1,400 (4 x \$350) based on the New York magazine license for interior page rights, and no more than \$3,400 (4 x \$850) based on the New York magazine license for cover page rights.

I also analyzed the pricing for the license fee in two additional ways.

First, I utilized the AP pricing guide (as shown in **Exhibit 4**) to assess a comparable license fee for the magazine advertisements. Based on the AP pricing guide, I identified a license fee of \$690 for the total circulation of the four magazines. Once again, I have assumed that the parties would have entered into one license to cover the advertisements in all of the magazines.⁹² This payment amount relates to the best comparable category identified in the pricing guide – *i.e.*, the use of an image as a full-size page in the interior of a magazine with rights to distribute a volume of units totaling up to 1 million (*i.e.*, the tier volume which would assumedly cover the combined circulation of the four magazines) and including rights for electronic distribution.⁹³ However, I understand that a "promotional" license would increase the cost of the license as compared to a license for editorial use.⁹⁴ Therefore, I have applied a license fee to each of the four magazine advertisements using the AP

90 I understand Getty Images licenses on this basis – *i.e.*, as "the sum of each publication's circulation multiplied by insertions." (www.gettyimages.com.) Given that the AP appears to have modeled its pricing structure after the Getty Images' pricing structure, it is reasonable to assume that the AP would license rights in a similar fashion.

91 DeGrave Deposition, p. 100.

92 As stated, I understand Getty Images licenses on this basis – *i.e.*, as "the sum of each publication's circulation multiplied by insertions." (www.gettyimages.com.)

93 Dale Deposition, Exhibit 8. See amount for Editorial – Magazine Interior, Full Size, Electronic Included, Up to 1 Million Units.

94 DeGrave Deposition, p. 100.

pricing guide under the same category (and under the assumption that each magazine had a circulation similar to Nylon of less than 250,000)⁹⁵ to quantify an upper bound under this component of the pricing analysis – *i.e.*, \$560 for each magazine, or \$2,240 in total.

Second, I utilized the Getty Images website to assess the price of a license for an image⁹⁶ under the considerations and criteria similar to this license – *i.e.*, non-exclusive use of an image as a full-size page advertisement to promote political views with rights to distribute a volume of units totaling up to 1 million (*i.e.*, the tier volume which would assumedly cover the combined circulation of the four magazines) in the U.S.⁹⁷ This exercise resulted in a price of \$2,215, as shown in **Exhibit 6**. This payment amount relates to a “promotional” license covering the total circulation of the four magazines.⁹⁸

Based upon my analysis, it is my opinion that the appropriate license fee related to the magazine advertisements would have ranged from \$690 to \$3,400 and would have likely been \$2,215.

- **Flyers and Postcards**

One 3 Two paid \$1,950 to Integrity Print Group for the printing of 30,000 postcards which contained the Obama Image.⁹⁹ One 3 Two paid \$5,700 to Alloy Marketing for the production of flyers which contained the Obama Image.¹⁰⁰

I have assumed the Obama Image would have been reproduced as the entire postcard and/or flyer and, without information as to the number of flyers that were distributed, I have also assumed that the cost to produce a flyer containing the Obama Image was similar to the cost to produce a postcard. Based on this assumption, the total flyers produced would equal approximately 90,000 units (*i.e.*, \$5,700 divided by \$0.065 per unit). I have been provided with information to support that 30,000 postcards were

95 Dale Deposition, Exhibit 8. See amount for Editorial – Magazine Interior, Full Size, Electronic Included, Up to 250,000 Units.

96 I performed a search for “president” under Getty’s rights managed creative stock image gallery. I chose two separate photos – one of Former President George W. Bush (Image #82111091) and one of Former President Bill Clinton (Image #200126557-001) for this exercise. (www.gettyimages.com)

97 I assumed a one year duration for purposes of this analysis. However, it is likely that a six month period would cover the approximate time period that the advertisements would have run in all four magazines. The incremental difference in pricing based on this criterion is \$145. See **Exhibit 6-A**. (www.gettyimages.com.)

98 I understand Getty Images licenses on this basis – *i.e.*, as “the sum of each publication’s circulation multiplied by insertions.” (www.gettyimages.com.)

99 OTT 000054-55.

100 OTT 000087-88; and Broders Deposition, pp. 237-240.

produced.¹⁰¹ As a result, the parties would have negotiated for either one license for approximately 120,000 units or separate licenses for 30,000 and 90,000 units, respectively. I understand that the postcards were created in August 2008 for the Democratic National Convention, while the flyers were created for distribution in October/November 2008.¹⁰² As a result, Shepard Fairey and One 3 Two may, or may not, have known the total volume of the printed materials that were planned to be created.

Therefore, I analyzed the pricing as a single license for the entirety of the printed materials and as two separate licenses for the postcards and the flyers in two distinct ways.

First, I analyzed the pricing for the license fee using the AP pricing guide (as shown in **Exhibit 4**) to assess a comparable license fee for postcards and flyers. I have assumed that the AP would have licensed the flyers and postcards collectively in a similar fashion as compared with the way Getty Images licenses these types of printed materials.¹⁰³ I was unable to identify a comparable category based on the AP pricing guide. However, I assumed that the following category would be the best comparable in this instance – *i.e.*, the use of an image as a full-size magazine cover with rights to produce and distribute up to 250,000 units and without rights for electronic distribution. Based on the AP pricing guide, I identified a license fee of \$740.¹⁰⁴ However, if the parties entered into separate licenses for the flyers (~90,000 units) and the postcards (30,000 units), the license fee would be \$685 (for up to 100,000 flyers) and \$625 (for up to 50,000 postcards) or \$1,310 in total, under the same pricing guide category as above. As stated, I understand that a “promotional” license would increase the cost of the license as compared to a license for editorial use.¹⁰⁵

Second, I utilized the Getty Images website to assess the price of a license for an

101 OTT 000054-55.

102 OTT 000054-55, 87-88; and Broders Deposition pp. 237-240.

103 I understand Getty Images licenses flyers (*i.e.*, “single sheet”) and postcards collectively. (www.gettyimages.com.)

104 Dale Deposition, Exhibit 8. See amount for Editorial – Magazine Cover, Full Size, Electronic Excluded, Up to 250,000 Units.

105 DeGrave Deposition, p. 100.

image¹⁰⁶ under the considerations and criteria similar to this license – *i.e.*, non-exclusive U.S. rights to produce and distribute up to 250,000 flyers and postcards to promote political views.¹⁰⁷ This exercise resulted in a price of \$945, as shown in **Exhibit 7**. However, if the parties entered into separate licenses for the flyers (~90,000 units) and the postcards (30,000 units), the license fee would be \$835 (for up to 100,000 flyers) and \$730 (for up to 50,000 postcards) or \$1,565 in total, under the Getty Images pricing structure (as shown in **Exhibits 7-A and 7-B**). These payment amounts relate to a “promotional” license covering the total print runs and distribution of the postcards and flyers.

Based upon my analysis, it is my opinion that the appropriate license fee related to the flyers and postcards would have ranged from \$740 to \$1,565 and would have likely been \$1,565.

- **Posters**

One 3 Two paid approximately \$22,263 to Heinz Weber for 70,000 posters which contained the Obama Image.¹⁰⁸ These posters were distributed during various campaign events for Barack Obama, as well as to retail accounts of One 3 Two that gave the posters to its customers free of charge.¹⁰⁹

I have assumed the Obama Image would have been reproduced as the entire poster and that the parties would have negotiated for the rights to produce and distribute 70,000 posters.

In this instance, the Palestinian Woman Photo license and the Obama for America license (for 5,000 retail posters) serve as comparable licenses. Similar to the analysis performed for the T-shirt license above, I quantified the maximum incremental dollar increases by unit threshold amounts from 5,000 units up to 100,000 units.¹¹⁰ In other words, I ascertained the highest possible increase in a license fee for an increase in total units created from the 5,000 unit threshold to the 100,000 unit threshold, which resulted in \$470 (as specified below).

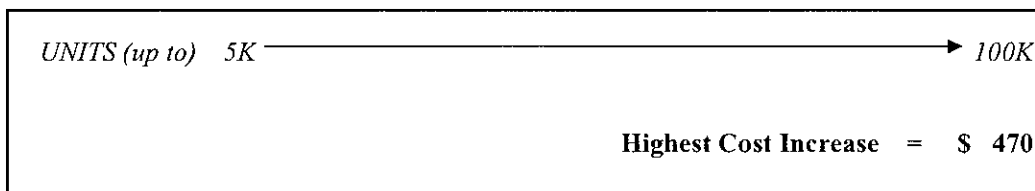
106 I performed a search for “president” under Getty’s rights managed creative stock image gallery. I chose two separate photos – one of Former President George W. Bush (Image #82111091) and one of Former President Bill Clinton (Image #200126557-001) for this exercise. (www.gettyimages.com)

107 I assumed a 6 month duration for purposes of this analysis. Additionally, I understand Getty Images licenses flyers (*i.e.*, “single sheet”) and postcards collectively. (www.gettyimages.com.)

108 OTT 000057-59.

109 Broders Deposition, pp. 241-243.

110 Dale Deposition, Exhibit 8. (See line item for Editorial Book Front Cover, Wrap Around, Electronic Included.)



I applied this \$470 highest possible cost increase to the \$387 price paid under the Palestinian Woman Photo license (for 500 limited edition prints) as well as to the \$550 price paid under the Obama for America license (for 5,000 posters), given the similarities between the two licenses. This results in amounts totaling \$857 and \$1,020, respectively.¹¹¹

I also analyzed the pricing for the license fee in two additional ways.

First, I utilized the AP pricing guide (as shown to **Exhibit 4**) to assess a comparable license fee for the posters. I was unable to identify a comparable category based on the AP pricing guide. However, I assumed that the category previously identified for the flyers/postcards license above would be the best comparable in this instance – *i.e.*, the use of an image as a full-size magazine cover with rights to produce and distribute up to 100,000 units and without rights for electronic distribution. Based on this information, the AP pricing guide specifies a license fee of \$685.¹¹² However, I understand that a “promotional” license would increase the cost of the license as compared to a license for editorial use.¹¹³

Second, I utilized the Getty Images website to assess the price of a license for an image¹¹⁴ under the considerations and criteria specific to this license – *i.e.*, non-exclusive U.S. rights to make and distribute more than 50,000 posters to promote political views.¹¹⁵ This exercise resulted in a price of \$760, as shown in **Exhibit 8**.

111 As stated in the Jarosz Report, “analysis of the AP pricing guides indicates that the price for the highest volume license differs from the price for the lowest volume usage in any given application by a factor of less than three.” (See Jarosz Report, p. 32 and Tab 13) Applying a multiplier of three (based on Mr. Jarosz’s analysis) would result in a license fee totaling \$1,161 (*i.e.*, \$387 x 3) and \$1,650 (*i.e.*, \$550 x 3).

112 Dale Deposition, Exhibit 8. See amount for Editorial – Magazine Cover, Full Size, Electronic Excluded, Up to 100,000 Units.

113 DeGrave Deposition, p. 100.

114 I performed a search for “president” under Getty’s rights managed creative stock image gallery. I chose two separate photos – one of Former President George W. Bush (Image #82111091) and one of Former President Bill Clinton (Image #200126557-001) for this exercise. (www.gettyimages.com)

115 I assumed a two year duration for purposes of this analysis. The license considerations and criteria also include “retail” rights.

This payment amount relates to a promotional license covering the total print run and distribution of the posters.

Based upon my analysis, it is my opinion that the appropriate license fee related to the posters would have ranged from \$685 to \$1,020 and would have likely been \$760.

- **Windows**

One 3 Two paid Monster Media invoices, totaling \$7,049, for the installation of the Obama Image on 17 storefront windows.¹¹⁶ I have assumed the Obama Image would have been reproduced in a storefront window and that the parties would have negotiated for rights for 17 locations.

I analyzed the pricing for the license fee in two ways.

First, I analyzed the pricing for the license fee using the AP pricing guide (as shown in **Exhibit 4**) to assess a comparable license fee for the window displays. I was unable to identify a comparable category based on the AP pricing guide. However, I assumed that the category related to the use of an image as a mural in a museum display with rights for multiple uses and for more than 10 locations would be the best comparable in this instance. Based on this information, the AP pricing guide specifies a license fee of \$975.¹¹⁷

Second, I utilized the Getty Images website to assess the price of a license for an image¹¹⁸ under the considerations and criteria specific to this license – *i.e.*, non-exclusive U.S. rights to make and distribute point-of-sale window displays for up to 50 locations to promote political views.¹¹⁹ This exercise resulted in a price of \$1,360, as shown in **Exhibit 9**. This payment amount relates to a promotional license covering the total print run and distribution of the posters.

Based upon my analysis, it is my opinion that the appropriate license fee related to the window displays would have ranged from \$975 to \$1,360 and would have likely been \$1,360.

116 OTT 000060-65, 76-78, and 79-82; and Broders Deposition, pp. 220-221.

117 Dale Deposition, Exhibit 8. See amount for Museum Display, Multiple Use - Prominent, Mural Size, More than 10 Locations, Not Displayed on Web, Up to 5 years.

118 I performed a search for "president" under Getty's rights managed creative stock image gallery. I chose two separate photos – one of Former President George W. Bush (Image #82111091) and one of Former President Bill Clinton (Image #200126557-001) for this exercise. (www.gettyimages.com)

119 I assumed a two year duration for purposes of this analysis.

Summary

48. Based on my analysis, the license fee for non-exclusive rights for the specific uses detailed below (also see **Exhibit 10**), would have ranged from \$4,990 to \$9,965 and would have likely been \$7,925.

License Use (Non-Exclusive Rights)	Minimum License Fee	Maximum License Fee	Likely License Fee
T-Shirts (Initial License)	\$590	\$590	\$590
T-Shirts (Subsequent License)	\$1,310	\$2,030	\$1,435
Magazine Advertisements	\$690	\$3,400	\$2,215
Flyers and Postcards	\$740	\$1,565	\$1,565
Posters	\$685	\$1,020	\$760
Windows	<u>\$975</u>	<u>\$1,360</u>	<u>\$1,360</u>
TOTAL	\$4,990	\$9,965	\$7,925

VII. EVALUATION OF THE KEDROWSKI REPORT

49. I have also been asked by Counsel to evaluate certain opinions and conclusions proffered by Ms. Kedrowski as to the appropriate license fee for use of the Obama Photo. This section contains my assessment of these opinions as outlined in the Kedrowski Report.

Actual Damages – Understanding of the AP’s Claims of an Appropriate License Fee for use of the Obama Photo

50. This section sets forth my understanding of the actual damages alleged by the AP and the subsequent section contains my analysis of these allegations. It is my understanding that the Kedrowski Report sets forth the actual damages (*i.e.*, the license fee for use of the Obama Photo) to which the AP claims it is entitled, related to the alleged copyright infringement by the Counterclaim Defendants.

51. I have reviewed the Kedrowski Report, dated October 1, 2010. I understand the Kedrowski Report identifies the following measures of actual damages:

Fixed Fee - License:

Original License Agreement Bundle: **\$2,000**
(5,000 T-shirts; 500 Posters; 5,000 Stickers;
and Internet Download of Posters for 3 yrs)

Revenue Share - License:

	<u>Revenue</u>	<u>Rate</u>	<u>Total</u>
Shepard Fairey and related entities			
Fine Artwork	\$81,706	17%	\$13,890
All Other	\$999,598	10%	<u>\$99,960</u>
			\$113,850
Obey Clothing			
Revenue – Infringing Works	\$2,434,174	10%	\$243,417
<i>TOTAL LICENSE FEE:</i>			<u>\$359,267</u>

Actual Damages – Appropriate License Fee

52. I understand that Ms. Kedrowski asserts that “the most appropriate method of calculating the actual damages suffered by The AP is a license fee based on the use of the Obama Photo as the source for the Infringing Works by Fairey and Obey Clothing.”¹²⁰ The analysis put forth in the Kedrowski Report supporting her conclusion as to this appropriate license fee: (i) is speculative and relies upon unsupported information; (ii) fails to appropriately consider relevant factual information; and (iii) greatly overstates damages in this instance. Below I will address certain of these areas in which I take issue with the approach and conclusions reached by Ms. Kedrowski.

(i) Speculative and Relies Upon Unsupported Information

53. In regards to Ms. Kedrowski’s actual damages opinion, the license fee analysis put forth in the Kedrowski Report is speculative and relies upon information that is not supported by any evidence on record. As a result, and based upon her flawed analysis, she concludes that the license fee for the Obama Photo would be in the form of an “initial” lump sum and then “later” a running royalty as a percent of net revenues.¹²¹

54. The first issue I take with Ms. Kedrowski’s analysis is the lack of factual basis on which she concludes the structure of the license fee in this instance. Specifically, I disagree with her conclusion that

120 Kedrowski Report, p. 33.

121 Kedrowski Report, pp. 52-53.

the license fee would, in whole or in part, have been in the form of a "revenue share."¹²² While I agree with Ms. Kedrowski's premise that the license fee would have been an "established royalty under The AP's licensing program based upon Fairey's and Obey Clothing's intended use",¹²³ I have seen no information, including the information cited in the Kedrowski Report that has been produced in this litigation, which would suggest that a revenue-based license fee was ever established or utilized in practice by the AP.

55. The only evidence put forth in the Kedrowski Report regarding the extent to which the AP has actually utilized a revenue-based fee in its licensing practices are discussions between Ms. Kedrowski and certain employees at the AP.¹²⁴ Based upon these discussions, Ms. Kedrowski makes broad generalizations regarding a hypothetical negotiation which she contends would have resulted in a license fee structure that included both a fixed and a royalty based component. However, I have not seen, nor has Ms. Kedrowski referenced, any information or documentation (other than her discussions with AP personnel) that supports this contention.

56. Further, the Kedrowski Report references one supposed example of a revenue-based license entered into by the AP stating: "For example, licensing the AP images for the National Football League posters and related commercial projects may result in revenue shares of 17-40%."¹²⁵ However, the information which purportedly supports this example are the same discussions (discussed above) between Ms. Kedrowski and AP personnel. Moreover, the Kedrowski Report does not reference any documentation or testimony supporting the existence of this supposed transaction and provides no additional details surrounding the transaction which would allow one to draw any conclusions as to its applicability or comparability. Therefore, given that I have seen no evidence on record that a revenue-based approach has ever been utilized in practice by the AP and that Ms. Kedrowski does not provide any documentation or testimony (other than her discussions with the AP) to support her position, I find her conclusion regarding the appropriate structure of a license fee in this instance to be highly speculative and lacks any supportable basis.

(ii) Fails To Appropriately Consider Relevant Information

57. In regards to Ms. Kedrowski's actual damages opinion, the license fee analysis put forth in the Kedrowski Report fails to appropriately consider certain information produced in this matter.

122 Kedrowski Report, p. 53

123 Kedrowski Report, p. 52.

124 Kedrowski Report, p. 38. (These discussions by Ms. Kedrowski were with AP personnel in the New Media Markets department – Dawn Cohen, Sales Manager, and Lloyd Pawlak, Sales Director. I understand neither employee was identified by the AP in its Initial Disclosures or Amended Disclosures under Federal Rule of Civil Procedure 26, nor in the AP's Objections and Responses to either of the two Rule 30(b)(6) notices.)

125 Kedrowski Report, p 38.

Specifically, in her conclusion as to the hypothetical structure of the license fee, she does not properly account for one of the strongest indications of the AP's established licensing practices – actual prior licenses entered into by the AP. The Kedrowski Report discusses at least seven specific licenses that the AP actually entered into for “Obama-related images.”¹²⁶ Each of these licenses was structured as a lump-sum fee based upon a predetermined quantity and specific use, and the license fees range from \$35 to approximately \$3,300. Additionally, there were also several prior license agreements entered into between One 3 Two (or Shepherd Fairey) and the AP. The Kedrowski Report discusses each of these licenses, which also were all structured as a lump-sum fee based upon a predetermined quantity and specific use, and the license fees for these agreements range from \$150 to \$590.¹²⁷ It should be noted that based on the documents produced in this matter, including the information cited in the Kedrowski Report that has been produced in this litigation, none of the licenses entered into by the AP included, in whole or in part, a structure that utilized a revenue-based license fee.

58. These licenses, as discussed by Ms. Kedrowski in her report and outlined above within this report, are actual transactions that have been entered into by the AP (and in certain cases by the AP and Shepard Fairey or One 3 Two), which provide a strong indication of the AP's established licensing practices. In each instance, the AP's licenses did not take the form a revenue share, and instead, were structured as a lump-sum fee for a predetermined quantity and specific use.

59. Additionally, I understand that Ms. Kedrowski discusses and relies upon certain licenses entered into by Shepard Fairey or One 3 Two that included fees as a percent of revenue (e.g., Al Rockoff, Martha Cooper). However, these licenses are not instructive as to the appropriate licensing fee between the AP and Shepard Fairey / One 3 Two in this instance as they are not representative of the AP's typical licensing practices and procedures for its images.¹²⁸ As discussed, based on the information reviewed, including the information cited in the Kedrowski Report that has been produced in this litigation, there is no evidence to support that the AP has ever entered into a royalty based license for use of its images. Therefore, the AP's license agreements, including agreements with Shepard Fairey (among many others), provide the most relevant and useful information in the determination of the appropriate license structure between these parties related to these particular uses.

126 Kedrowski Report, pp. 39-41.

127 Kedrowski Report, pp. 42-43.

128 Ms. Kedrowski also includes significant discussion regarding industry licensing rates. (Kedrowski Report, pp. 49-52) However, these industry rates are also not relevant or comparable in this instance given the existence of numerous actual licenses entered into by AP (and other industry players such as Getty Images), which are more applicable to the specific facts and circumstances of the hypothetical negotiation in this instance. Additionally, it should be noted that Ms. Kedrowski does not rely on these industry licenses, stating: “...I am not specifically relying on these licenses as comparable transactions[.]” (Kedrowski Report, p. 50)

(iii) Greatly Overstates Damages

60. In regards to Ms. Kedrowski's actual damages opinion, the license fee analysis put forth in the Kedrowski Report greatly overstates damages in this matter. As discussed above, I take issue with Ms. Kedrowski's conclusion that the license fee in this instance would take the form of a revenue share agreement. Her failure to determine the proper form of the license fee in this instance is evidenced by the total actual damages put forth in the Kedrowski Report of \$359,267, as compared to any other actual license entered into by the AP.

61. By way of comparison (and as discussed above), the AP entered into an agreement with Soup Kitchen International, Inc. (the restaurant owned by the gentleman referred to as the "Soup Nazi" in the Seinfeld sitcom) in April 2006 for a license fee of \$30,000. This significant license fee amount provided rights to Soup Kitchen International for "all industry, exclusive rights to Soup Kitchen International, Inc., its subsidiaries and affiliates for all advertising media rights, in perpetuity, predated to first date of appearance."¹²⁹ Given the wide-ranging exclusive rights provided under this license and the \$30,000 fee paid for such rights, it seems illogical that One 3 Two (or Shepard Fairey) would agree to a license fee approximately 12 times this amount (or 1,200% greater). This considerable deviation from the AP's historical licensing fees demonstrates the unreasonableness of Ms. Kedrowski's opinion as to the appropriate license fee. Overall, Ms. Kedrowski significantly overstates actual damages in this instance.

62. Additionally, the maximum license fee in this instance would have been no greater than \$30,000. This amount is the highest on record of a license entered into by the AP and provided more valuable rights than any license that would have been entered into between Shepard Fairey (and One 3 Two) and the AP. The "Soup Nazi" license granted exclusive, all-industry advertising right into perpetuity, while any license between Shepard Fairey and One 3 Two and the AP would have been for non-exclusive rights related to the sales and giveaways of certain promotional merchandise for a limited period of time.

VIII. CONCLUSION

63. Based on my analysis and review of the materials produced in discovery in combination with my knowledge, experience, education and training, it is my opinion that the license fee for non-exclusive rights for the specific uses detailed below, would have ranged from \$4,990 to \$9,965 and would have likely been \$7,925, as shown in **Exhibit 10**.

¹²⁹ AP0002636. (This license fee is the largest amount I have seen based on the information I have reviewed. Given the considerations and criteria of the transaction (i.e., exclusive use, full advertising media rights, no other commercial uses granted), this would serve as an upper bound for a licensing transaction between the parties granting exclusive rights to the Obama Photo.)