

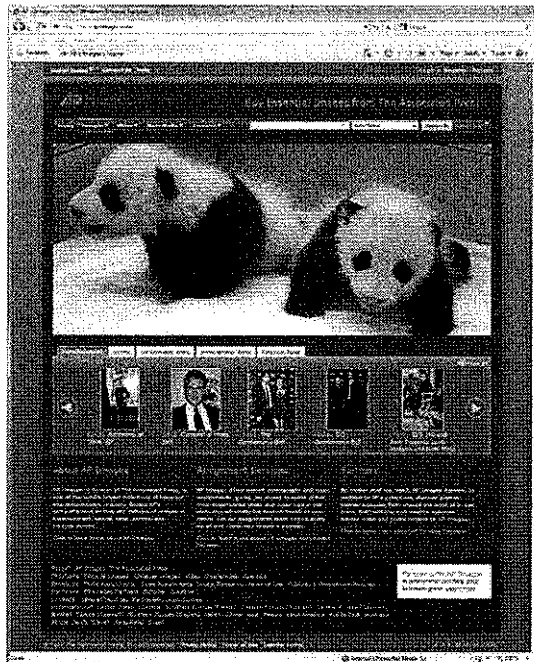
EXHIBIT D
TO CROWTHER DECLARATION
IN SUPPORT OF ONE 3 TWO, INC.'S
MOTION IN LIMINE NO. 2
PART II OF IV

former employer, Getty Images, which also has a searchable website where users can access its photo content.³⁹

43. The AP Images archive business is well known as part of The Associated Press' strategy to develop alternative revenue sources to sustain its news gathering operations.⁴⁰ The introduction of AP Images involved significant investment in personnel, technology, and photo equipment, a reorganization of the company away from regional control of image sales, and the hiring of new managers and sales staff with experience and expertise in the business of image licensing.⁴¹

D. How AP Images Works

44. AP Images is accessed via its website, <apimages.com> (Exhibit E). The home page for AP Images is shown below:



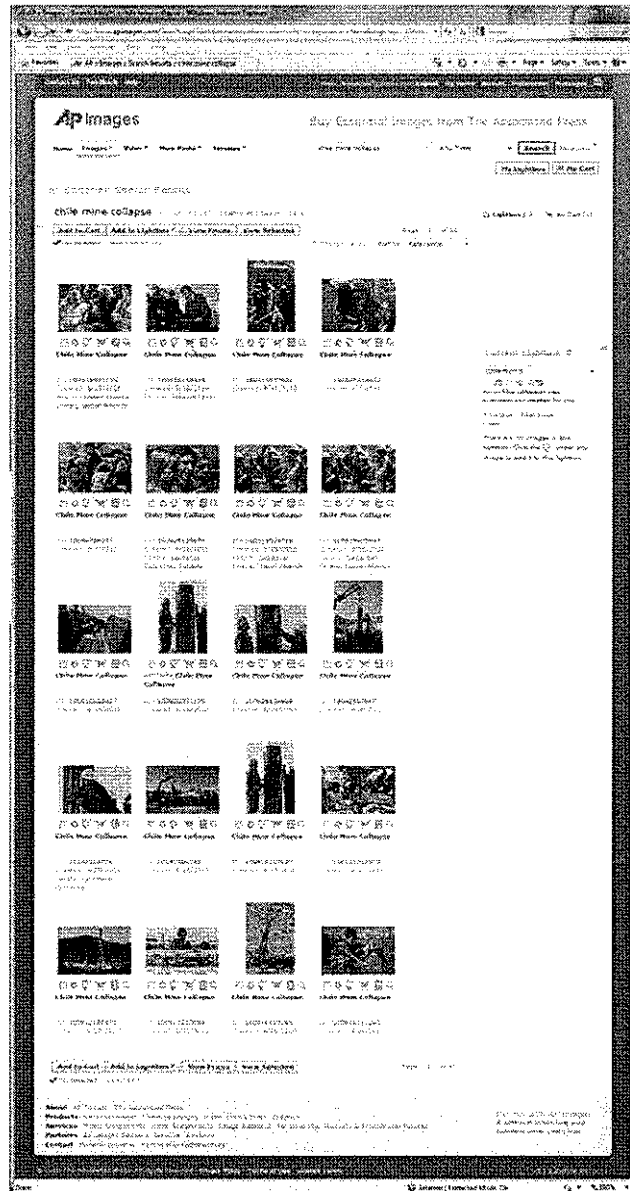
³⁹ AP Images Strategic Plan 2007-2009 (09b - AP0005572-5602). Some of the key elements that were modeled after the industry included pricing plans and rates similar to Getty Images, including deals structured more closely to revenue sharing and away from flat-rate pricing. Interview with F. DeGrave, Oct. 1, 2010; see also F. DeGrave (Mar. 23, 2010) Tr. at 120:7-14, 120:24-121:6.

⁴⁰ Interview with F. DeGrave, Oct. 1, 2010.

⁴¹ AP Images Strategic Plan 2007-2009 (09b - AP0005572-5602), pages 12-18; interview with Farah DeGrave, Oct. 1, 2010; F. DeGrave (Mar. 23, 2010) Tr. at 104:5-8.

45. Tabs at the bottom of the home page allow customers to preview available images in categories such as “entertainment,” “sports” and “international news.” The home page also offers a link to a section where registered users can browse royalty-free images.

46. Alternatively, a customer who is looking for an image of a particular subject matter can search the entire archive of almost 9 million images by typing a simple search query, such as “Chile Mine Collapse,” in a search window at the top of the page. A sample page of search results is shown below, returning 1,247 pictures matching the search query:



47. The AP Images site allows users to create “lightboxes” -- essentially a collection of images from the archive that the user is interested in licensing.

48. Once a commercial customer has identified the image(s) that he/she wishes to license, the customer calls AP Images and speaks directly with a sales representative to negotiate a license for the particular image(s).

49. The AP Images sales representative typically gathers information from the customer about such pricing criteria as where the customer is planning to use the image, the market in which the customer is planning to use the image (domestic or international), where the customer is planning to use the image (cover or internal), the size of the customer’s project, the customer’s budget, the value of the customer’s project, and then quotes a price based on that information.⁴² As Farah DeGrave, Operations Manager for New Media Markets at The Associated Press, testified, “if a client is going to license something from us, we will ask them specific questions about how the image is going to be used. Based on that information, we will issue them a license.”⁴³

50. The Associated Press’ sales representatives customize each license to a commercial customer based on the particular characteristics of each customer’s planned use and The Associated Press’ pricing guidelines.⁴⁴

51. Licenses are typically negotiated very quickly, with price quotes usually being provided within hours and in some cases during the initial conversation with the sales representative.

52. AP Images makes it easy for a customer to locate quickly an image that it wants to use and then negotiate a license for that use.

53. Based on the material I have reviewed, it is my understanding that Mr. Fairey has previously licensed images from AP Images. One example is a photograph of a Palestinian woman by Kevin Frayer that Mr. Fairey licensed from The Associated Press

⁴² F. DeGrave (Mar. 23, 2010) Tr. at 29:21-25, 57:5-58:3, 58:23-59:9, 62:4-6, 63:4-6, 69:12-14, 71:11-14, 94:14-20, 109:18-23.

⁴³ Id. at 89:20-25.

⁴⁴ See, e.g., F. DeGrave (Mar. 23, 2010) Tr. at 29:21-25.

on December 12, 2008, just a few months after he used the Obama Photo. The licensed photograph is shown below on the left and the derivative work based on the photograph are set forth below on the right:



The Associated Press Photograph



Fairey's Licensed Derivative Work

54. Under the terms of the license, Fairey paid The Associated Press (i) \$590 for use of the image on up to 5,000 t-shirts for one year and (ii) \$387 for use of the image on up to 500 "illustrated prints" for five years, for a total license fee of \$977.⁴⁵

55. Based on the deposition testimony of Mr. Fairey's wife, Amanda Fairey, and on her e-mails with Elisa Marquez, an AP Images sales representative, about licensing the "Palestinian Woman" image, it appears that the negotiation of the license was conducted in a timely and responsive manner.

56. The AP Images sales representative was able to provide an initial price quote on the same day that Fairey contacted AP Images about licensing the image.⁴⁶ Ms. Fairey testified that Ms. Marquez, who had set up an online AP Images account for Ms. Fairey, was "helpful and nice."⁴⁷

⁴⁵ See FAIREY69300.

⁴⁶ See Nov. 11, 2008 E-mail from A. Fairey to E. Marquez, FAIREY69062-66.

⁴⁷ A. Fairey (Sept. 18, 2009) Tr. at 140:4-6.

57. Based on Fairey's communications with The Associated Press about the images, it clearly was helpful to Mr. Fairey to have AP Images as a source for a wide variety of high-resolution images.

E. The Existence of AP Images Leads to the Creation of More Content

58. In my experience, Getty Images, Reuters and Corbis all have as a key part of their business strategy a focus on continually developing large numbers of new images for inclusion in their respective archives.

59. For example, in 1997 at Super Bowl XXXI, as editor in charge for Reuters, I filed approximately 200 pictures of game action, the sidelines, fans, celebration and awards from the game. Ten years later, in 2007, Getty Images filed more than 3000 pictures from Super Bowl XLI,⁴⁸ largely because of the increased importance of the archive. Getty Images photographers are trained to shoot pictures for the archive in every situation. Indeed, even when arriving to shoot an assignment in a city, Getty Images photographers will shoot updated pictures of the airport.

60. Indeed, when I was at Getty Images the need to populate the archive led to a sustained focus on generating large numbers of new photos on an ongoing basis.

61. It is my understanding that since AP Images was established in 2005, The Associated Press' photo operation has similarly been focused on generating content for licensing by AP Images to its customers, recognizing that "any photograph can be used again, re-purposed."⁴⁹

62. As part of this focus, as is the case with other photo archives, The Associated Press' photographers are trained and instructed to make photographs not only to cover the news of the day, but also to create content for an unlimited variety of potential future licensing uses. Indeed, the original AP Images business plan contemplated leveraging The

⁴⁸ <http://www.gettyimages.com> Search Results

⁴⁹ See D. Ake (Jan. 13, 2010) Tr. at 244:15-16.

Associated Press' strengths to increase the quantity of photos available for editorial needs.⁵⁰

63. In addition to documenting potentially significant contextual information about an event, such as its location or setting, any speakers or spectators, and the purpose of the event, photographers are also told to make many photos and to look for opportunities to make photos that go beyond simply reporting on the event itself.⁵¹

64. At his deposition, David Ake, the manager of The Associated Press' Washington, D.C. bureau, testified that "We require [Associated Press photographers] to be quick on their feet, to think a lot, think both about the core of their particular assignment, but always look broader. Is there something else there? Is there a story there? Are there other elements there? I preach the gospel a lot."⁵²

65. Ake also testified that "[Photographers] are encouraged actually if they see something in their daily thing to, weather is an excellent example, if they are on their way to something at the [S]tate [D]epartment, and they look up and there is a beautiful photograph of the sun rising behind the Washington Monument, I would encourage them to stop and shoot that. So generally staff photographers are encouraged to look around and see what else is happening around them."⁵³

66. With respect to the Obama Photo at issue in this case, Associated Press staff photographer Mannie Garcia testified that The Associated Press encouraged him to go beyond the confines of a given assignment.⁵⁴

⁵⁰ D. Ake (Jan. 13, 2010) Tr. at 242:6-8 ("That same photographer could . . . stumble across something we did not assign him to . . .").

⁵¹ See AP Images Business Plan, 9/29/2003, AP0005765-5833, at AP0005775.

⁵² D. Ake (Jan. 13, 2010) Tr. at 86:12-18.

⁵³ D. Ake (Jan. 13, 2010) Tr. at 103:5-15.

⁵⁴ M. Garcia (Mar. 4, 2010) Tr. at 31:24-32:3 (acknowledging that The Associated Press encouraged him to go beyond the specific event he was attending and think creatively about the images he was making), 32:12-33:5.

67. In effect, the existence of AP Images has spurred the creation and availability of vastly more content than would otherwise have been the case if The Associated Press were only seeking to generate photo content for its news-gathering operations.

68. Although some photos might not have significant licensing potential, by generating a large volume of content The Associated Press and its competitors increase the chance that at least some images will generate revenue that can help support the entire news-gathering operation.

F. Photo Archive Content Is Licensed For A Wide Variety Of Uses

69. Photo archives do not usually attempt to predict what uses their customers will devise for their photo content. Rather, they focus on making compelling images that are suitable for a multitude of uses by their customers, including editorial, merchandise, educational, and entertainment. Uses can also be for both direct reproduction and for incorporation into derivative works. Ultimately, the only limit on the possible uses of an image is the customer's imagination.

70. For example, a photograph that I took of Wayne Gretzky breaking the NHL all-time scoring record on October 15, 1989, was licensed by Reuters to create Mr. Gretzky's likeness for the trophy presented by the NHL to Mr. Gretzky. Similarly, in 1994 a picture taken by a Reuters colleague during Sweden's gold medal-winning game at the Lillehammer Olympics was licensed by Reuters to the Swedish government and used on a postage stamp.

71. This is consistent with the essential purpose of a photo archive, which is to make very large numbers of images easily available to a wide audience of potential users.

72. One use for which photo archive content is commonly licensed is use in connection with political campaigns, including use on clothing, brochures, posters, and any manner of printed promotional material, backdrops, slide shows, image projections, and merchandise.

73. In fact, such licensing is a standard practice in the photo agency business. Like television stations that count on campaign advertising revenue every two years, photo agencies can budget around anticipated revenue during election cycles.

74. When I worked at Getty Images, we dedicated specific sales persons to handle the accounts of political campaigns. Getty Images has also created a separate website for licensing of political images and offering photographer assignment services to campaigns and other users.⁵⁵

G. Uses of AP Images Content

75. As is typical for all photo archives, AP Images content has been licensed for myriad different uses.

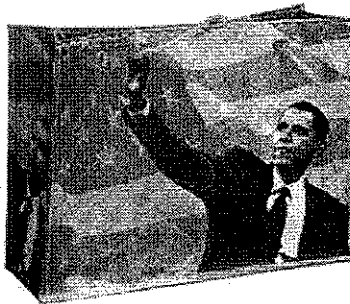
76. Like other photo archives, AP Images has licensed its photos for the creation of campaign materials by political campaigns and supporters of political candidates.

77. For example, as early as January 2008 the Obama for America election campaign was licensing images from The Associated Press for use in campaign materials, with a license that covered use of the image on 5000 retail posters.⁵⁶ Other images were licensed by the Obama for America organization for book covers⁵⁷ and book pages.⁵⁸

78. The Associated Press licensed a Feb. 12, 2008 image of Obama waving to a crowd to Flashbags, a Burlington, Vermont company for use on one of their tote bags.⁵⁹



The Associated Press Photograph



Flashbags Licensed Derivative Work

⁵⁵ Getty Images Campaign Headquarters (http://imagery.gettyimages.com/political/index.html?isource=direct-entry_political)

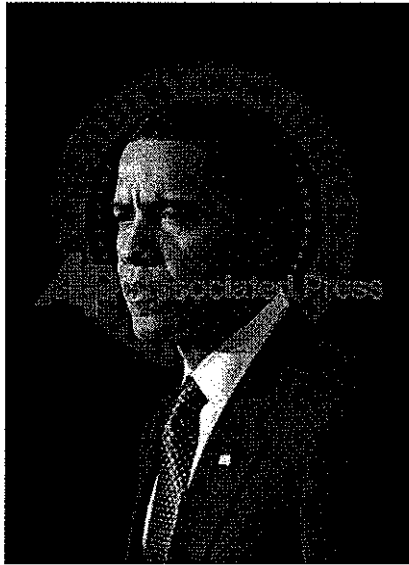
⁵⁶ AP Sales Invoice #365768 (marked Highly Confidential) dated January 15, 2008 (AP 0010683-84).

⁵⁷ AP Sales Invoice #376361 (marked Highly Confidential) dated July 31, 2008 (AP 0010699-702).

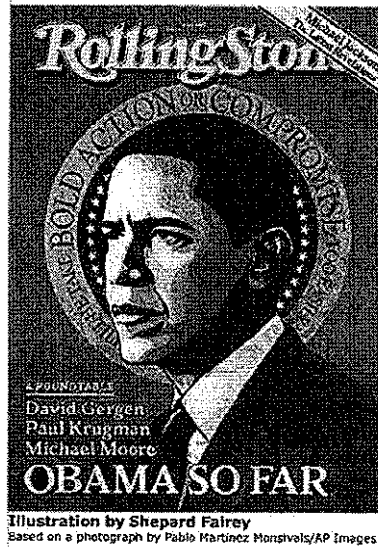
⁵⁸ AP Sales Invoice #376452 (marked Highly Confidential) dated Aug 1, 2008 (AP 0010703-4).

⁵⁹ AP Sales Invoice #380983 (marked Highly Confidential) dated Oct. 31, 2008 (AP 0002615-16).

79. In addition to licensing its images for use in political campaigns, The Associated Press has also licensed its photos for use as source photos for editorial uses. For example, *Rolling Stone* magazine licensed an Associated Press photograph, pictured on the left below, for use by Shepard Fairey in a cover derived from that photo, pictured on the right below.⁶⁰ This licensed artwork was featured on the cover of the August 2009 issue of *Rolling Stone* magazine with the credit, “Based on a photograph by Pablo Martinez Monsivais/AP Images.”



The Associated Press' Photograph



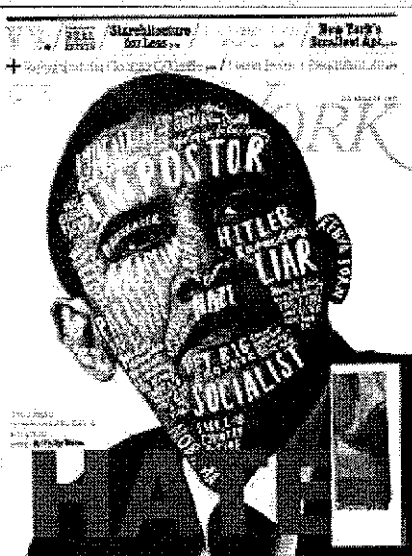
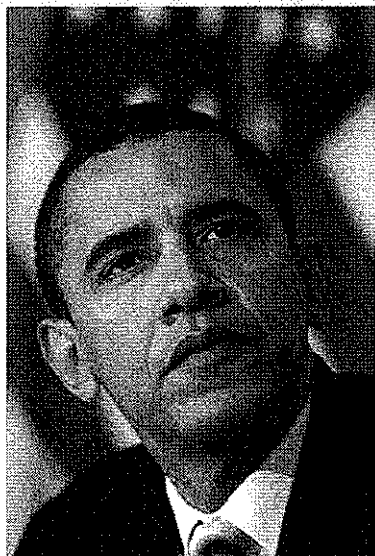
Fairey's Work

80. Another example is the cover images that Mr. Fairey created for the cover of the Italian edition of *Rolling Stone*, shown below on the right. The source photo, shown below on the left, was also licensed by *Rolling Stone* from The Associated Press.

⁶⁰ AP Sales Invoice #394968 (marked Highly Confidential) dated August 5, 2009 (AP 0003209-10).



81. Another example of an editorial use is the cover illustration for the September 28, 2009 edition of *New York* magazine, shown below on the right, that used the same source images -- the Obama Photo, shown below on the left -- as did Mr. Fairey. The cover illustration was licensed from The Associated Press and credited to “Mannie Garcia/AP.”



H. Photo License Pricing Practices

82. In the photo industry, the common practice is to first license an image for a limited use and then negotiate new licenses for additional uses of the same image. This may be done through a series of licenses, or a single license may provide for adjustments to the license fee in the event that the use expands.

83. There are many reasons for this two-step process. First, customers may not know at the outset all of the ways that they will end up using a photo. For example, a customer may not be sure exactly how it wants to use the image, in how many publications, in what media, or for how long. Second, a customer may initially envision making a particular use of a photo but then later come up with other uses for the same image. Third, a customer may not be sure at the outset that its proposed use will be commercially successful, or may not have the money to pay a larger initial fee, and thus may prefer a revenue-sharing model tied to potential future success.

84. In these situations, an initial license would ordinarily be negotiated granting narrow rights, for example, the right to publish once in one particular publication, with the understanding that the customer will call back if they want to negotiate further rights for other uses.

85. As an example, on February 13, 2006, while managing World Picture News, I learned that then-vice-president Dick Cheney had accidentally shot his hunting partner, Austin-based attorney Harry Whittington. World Picture News obtained exclusive rights to distribute a photograph of the reclusive Whittington. We were then contacted by the Tribune Company, parent company to the *Chicago Tribune* and owner of 10 daily newspapers in the United States, which wanted to license the photo. The *Tribune* was not sure how many papers it wanted to use the picture in, how many times it would ultimately want to use the photo, or for how long it wanted to retain the right to use the photo. The *Tribune's* ultimate use would depend on how the news story evolved.

86. World Picture News initially granted The Tribune Company the right to use the photo in the *Chicago Tribune* for a limited, defined period, with the understanding if The Tribune Company wanted to use it in more publications, or for a longer period of time, then it would contact us for additional licensing. Eventually The Tribune Company licensed the image for each of its newspapers in the United States for a period of two weeks, with an additional fee for each publication that used the image.

87. Also at World Picture News, in May, 2006, I oversaw negotiations with Vanity Fair to license pictures taken in Haditha, Iraq of the killings of Iraqi civilians by United States

Marines in a licensing deal that reached \$150,000 after evolving to include Web rights, video distribution and a one month embargo from licensing the image to other customers.

88. In December 2001 while managing Sipa Press, I licensed a picture of the “shoe bomber” Richard Reid that was taken by a passenger on American Airlines Flight 63, to a number of organizations, including the *New York Times* and several television networks. That deal involved a complex renegotiation of rights including multiple extensions of 24-hour usage periods, web rights, and agreements of use by the networks and their affiliates. The total revenue from these deals was more than \$100,000; the deal with the *New York Times* alone resulted in a payment of \$10,000.

89. During my time at Sipa Press and World Picture News, many of the images that we licensed to the major news magazines involved the magazines returning to license the image for additional uses, including use in their foreign publications, for their websites, or for use in year-end editions or other supplemental publications.

90. Deals that I designed or managed while director in Business Development at Getty Images were commonly structured around revenue sharing deals with resellers, content partners, content publishers and content creators. The typical arrangement called for Getty Images to receive a pro-rated portion of the partner’s revenue, based on the amount of Getty Images content included in their products.

91. Another common scenario involving multiple licenses or a multi-scenario license for the same image to the same customer involves book publishers. Many book publishers, especially text book publishers, do not initially know how many copies of a book will be published, how many editions of the book will be made, if the book will be in hardback and paperback, if the book will be translated and published in multiple languages or if the book will be distributed in multiple world regions. As and when each of these questions is answered, the license is modified or additional licenses are granted, each charging an additional fee.

92. In my experience, the fees for such additional licenses are calculated based on the sales representative’s estimation of what the particular use is worth – *i.e.*, how much revenue it likely will generate for the customer.

93. For instance, in licensing to editorial publications, broadcasters and websites, the image licensing price is based on a licensee's audience size, which directly determines the licensee's revenue.

94. For licensing to commercial customers, the sales representative typically gathers information from the customer about the size of the customer's project, the customer's budget and the value of the customer's project. The sales representative then quotes a price based on that information.

95. The size at which the customer wants to use the image is also a factor in determining price, which directly relates to what portion of the overall project will consist of the image. These are the same calculations an editorial publication uses in setting advertising rates for the placement of advertising.⁶¹ The larger the advertisement, the more prominent the advertising, the more copies, and the longer the duration of the use, then the higher the price. In essence, the fee for use of the image becomes a pro-rated portion of the revenue generated by the project.

96. In other words, the calculation of the licensing fee, whether for editorial or for commercial customers, and whether automated or discussed and negotiated with a sales representative, is always based on capturing a percentage of the customer's revenue for a given image or a given project.

97. For situations where an image is to be used on a low number of units that will be sold at a high price per unit, in my experience the typical royalty rate will be relatively high.

98. For example, during our October 2007 negotiations with an established San Francisco-based artist who wanted to use Getty Images photographs as montages in a larger single work, we considered the prices that the artist charged for his own work. The price range for that artist's commissioned work, typically depicting celebrities and made up of 1,500-6,000 individual photographs, was \$30,000 to \$40,000. The prices for the artist's non-commissioned works ranged from \$12,000 to \$18,000 for editions of 6-10

⁶¹ New York Times Advertising Rate Card for Magazines 2010

copies each. We ultimately negotiated a royalty due to Getty Images of 17% of gross sales.

99. In the opposite situation, where the image is to be used on a large number of units that will be sold at a low price per unit, the royalty rate per unit tends to be lower with the idea that the photo archive would be compensated based on higher volume.

100. I structured or managed a number of commercial partnership deals at Getty Images that involved delivery of Getty Images content for use in partner products. Among the deals that I handled was a 2006 deal with a startup Los Angeles-based company. Under the terms of that deal, Getty Images captured 30% of the company's profit from their sales, which resulted in a royalty of roughly 10% of the company's total sales based on an average profit margin of 20-30%.

I. The Associated Press' License Pricing Structure

101. It is my understanding that The Associated Press' strategic business model is premised on emulating the business models of its key competitors such as Getty Images, my former employer, as evidenced by, among other things, hiring away key personnel with experience working for competitors and greatly expanding its sales team.⁶²

102. A key component of the AP Images business model is to move toward pricing that is both (i) more in line with the generally higher prices charged by competitors such as Getty Images and Corbis and (ii) based directly or indirectly on a revenue-sharing arrangement.⁶³

103. As discussed above, prospective commercial customers are required to contact an Associated Press sales representative and discuss the nature and scope of the project at hand.

104. Once this relationship is established, the customer's project is managed based on how the project evolves. It is common for a customer to obtain multiple licenses for

⁶²In order to obtain high-level expertise, The Associated Press hired key personnel with experience at Getty Images, the industry leader, including Ian Cameron as VP of AP Images, Laura Malone as Intellectual Property legal counsel, Farah DeGrave as manager of sales operations, in addition to 18 additional sales persons for AP Images. Interview with F. DeGrave, Oct. 1, 2010.

⁶³ F. DeGrave (Mar. 23, 2010) Tr. at 120:6-14 and Ex. 12 (AP 0005572-5602).

different uses of the same image as the scope of a project evolves, or to have the initial license modified multiple times to add new uses.

105. As an example of the types of licenses that AP Images has arranged, in February 2009 The Associated Press announced it would become the exclusive commercial licensing agent for NCAA college sports photos.⁶⁴

106. In April 2009, The Associated Press successfully negotiated an exclusive licensing deal with the National Football League, which had previously had an exclusive licensing deal with Getty Images.⁶⁵

107. These deals by the Associated Press broke the virtual monopoly enjoyed by Getty Images with the major sporting leagues: NBA, Major League Baseball, National Hockey League, PGA, LPGA, International Olympic Committee, FIFA, Major Soccer League and a number of international leagues.

108. Although other news organizations may cover the events of these sports leagues and use the pictures editorially, Getty Images had been the only organization allowed to license images to lucrative commercial customers from these games, athletes and events.

109. According to Ms. DeGrave, in situations where an image is used without permission, it is The Associated Press' practice to impose a higher license fee than would otherwise have been charged.⁶⁶ In addition, at the companies I have worked for it was our practice to impose an increased licensing fee for violations of our licensing conditions, including failure to credit the image.

⁶⁴ http://www.pdnonline.com/pdn/content_display/photo-news/editorial/e3ie7ae6a91eebf611fb8da55452bab7ff9

⁶⁵ paidContent.org: AP and AFL Kick off Photo Licensing Deal, April 22, 2009 (<http://paidcontent.org/article/419-ap-and-nfl-kick-off-photo-licensing-deal/>); http://www.ap.org/pages/about/pressreleases/pr_042209a.html.

⁶⁶ Follow-up interview with Farah DeGrave, November 1, 2010.