

EXHIBIT B

**TO THE AP'S
MOTION IN LIMINE NO. 1
TO EXCLUDE OBEY CLOTHING'S
EXPERT GABRIELLE GOLDAPER
UNDER RULE 702**

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK	INDEX OF EXAMINATION	
SHEPARD FAIREY and OBEY GIANT ART, Plaintiffs, vs. CASE NO. 09CIV01123 (AKH)	WITNESS: GABRIELE GOLDAKER	
THE ASSOCIATED PRESS, Defendant and Counterclaim Plaintiff, vs.	EXAMINATION PAGE	
SHEPARD FAIREY, et al., Counterclaim Defendants	By Mr. Williams 6	
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VIDEOTAPED DEPOSITION OF EXPERT GABRIELE GOLDAKER	INFORMATION REQUESTED	
November 20, 2010 8:33 a.m. - 5:40 p.m.	Page Line (None)	
333 South Hope Street Los Angeles, California		
Marceline F. Noble, CSR No. 3024	WITNESS INSTRUCT NOT TO ANSWER	
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2 APPEARANCES OF COUNSEL	INDEX TO EXHIBITS	
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8 For Defendant and Counterclaim Plaintiff The Associate Press:	5 2 Color photograph; 1 page 11	
9 KIRKLAND & ELLIS 10 MICHAEL F. WILLIAMS, ESQ. BRENDAN KEHOE, ESQ. (Via telephone) 11 655 Fifteenth Street, N.W. 12 Washington, D.C. 20005 202.879.5123 202.879.5200 Fax 13 mwwilliams@kirkland.com	7 3 Sampling of Expert Witness 98 Experience; 6 pages	
14 For Counterclaim Defendants 132:	8 4 Tab and description; 1 page 111	
15 CALDWELL LESLIE & PROCTOR, PC 16 JEANNE A. FUGATE, ESQ. LAURIE C. MARTINDALE, ESQ. 17 1000 Wilshire Boulevard, Suite 600 18 Los Angeles, California 90017-2463 213.629.9040 213.629.9022 Fax 20 fugate@caldwell-leslie.com martindale@caldwell-leslie.com	10 5 Color and black-and-white 180 photographs; 2 pages	
22 Also Present: 23 ROBERT CUADRA, VIDEOGRAPHER	12 6 Excerpts from Fashion From 225 Concept to Consumer by Gini Stephens Frings; 61 pages	
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41 <p>1 said that there's evidence -- there's experience that  2 you have that's relevant to your opinions that's not  3 disclosed in your expert report.  4 So as we sit here, I'm entitled to find out  5 based on your memory, and without having you go back to  6 your office, what other clients there are whose  7 experience you say is relevant, and then I'm going to  8 ask you about them.  9 A. All right. Then why don't you ask me about my  10 own business called Sonbow.  11 Q. Before we do that now, I'd just like an answer  12 to the question that I've been asking, which is apart  13 from Stop Staring, is there any other work experience  14 not listed on your C.V. that's relevant to the opinions  15 that you've expressed in opinion 2?  16 A. No.  17 Q. Now, what is Sonbow?  18 A. Sonbow is my own company.  19 Q. Is that listed on your C.V.?  20 A. Yes. It's listed under the corporate name.  21 Prisma Corporation.  22 Q. Well, we'll come back to that then because it's  23 disclosed. First I want to make sure that I know what  24 the universe is and then I'll ask you about the  25 universe.</p>	43 <p>1 jump a little bit and worry that you're yelling at me to  2 Stop Staring because I have been staring at you.  3 A. I thought it was a very clever name. But you  4 know what, it caused a lot of trademark issues.  5 Q. Well, let's go back to the questioning and talk  6 about that.  7 Apart from Stop Staring, are there any other  8 clients with whose -- let me withdraw that question and  9 start again.  10 Apart from Stop Staring, are there any other  11 clients on behalf of whom you have professional  12 experience relating or relevant to your opinion No. 1  13 from your expert report?  14 A. No, not specifics.  15 Q. What do you mean when you say "no, not  16 specifics"?</p> <p>17 A. Because as I explained already, I've done so  18 many clients and I've worked with so many people that  19 because I know you're going to ask me about them, I  20 cannot give you specific names as to which client did I  21 have any of the issues that I specifically make  22 reference to in opinion 1 and 2.  23 Q. So as we sit here, apart from Stop Staring, you  24 can't identify any other clients who aren't disclosed on  25 your C.V. on behalf of whom you have relevant work</p>
42 <p>1 Okay?  2 A. Fine.  3 Q. Is there any other experience, work experience  4 that's relevant to the opinions that you express in  5 opinion 1 of your expert report that's not disclosed on  6 your C.V.?  7 A. Not in -- not specifically, no.  8 Q. How about generally?  9 A. So let me ask you the question.  10 My work with my clients dealing with the  11 subject of copyright infringement and trademark, would  12 that be considered by your definition work experience  13 related to that opinion?  14 Q. I'm asking what you think is relevant. You're  15 the one who has these experiences and you're the one  16 who's offering the opinions. So if you think it's  17 relevant, then I'd like for you to disclose it and if  18 you disclose it or if you say that it is relevant, I'm  19 going ask you facts about it.  20 A. Okay. Stop Staring is another perfect example  21 of my work related to copyright and trade dress. And  22 because I can't remember the specifics of other  23 clients -- because I've done too many of them -- I'll  24 just leave it at Stop Staring.  25 Q. You know every time you say Stop Staring, I</p>	44 <p>1 experience relating to the opinions in your expert  2 report?  3 A. That's correct.  4 Q. Can we talk about Stop Staring?  5 A. Oh, yes.  6 Q. When did you do work for Stop Staring?  7 A. I started with Stop Staring when they were  8 shipping like \$165,000 and they were like a little,  9 little, minuscule company. And I'm still working with  10 them six or seven years later, and they're shipping many  11 millions of dresses.  12 Q. You started working for Stop Staring around  13 2003 or 2004?  14 A. It's been roughly six or seven years. Six  15 years probably.  16 Q. 2004 sounds right?  17 A. Yeah.  18 Q. Where is Stop Staring located?  19 A. They are now -- I think it's called  20 Panorama City. They moved their offices recently.  21 Q. That is the location of -- may now be called  22 Panorama City?  23 A. I don't remember the exact -- where they moved  24 to. They, for many years, were right here on the  25 Garment Center right down on 9th and Broadway, yeah --</p>



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<p>1 concerning whether or not Stop Staring had the right to    2 use the Marilyn Monroe name?</p> <p>3 A. I did not because she was the creative person    4 of her line. She created the dress, she named the    5 dress. I was not involved in that. I was only called    6 in when that dress became an issue.</p> <p>7 Q. Now, you told Ms. Estrada to stop using the    8 Marilyn Monroe name; correct?</p> <p>9 A. I did tell her to stop using it and I did tell    10 her to pull the dress.</p> <p>11 Q. Did you have any view at the time that you told    12 Ms. Estrada to stop using the name about whether or not    13 she could legally use the name?</p> <p>14 A. Did you ask me if I had an opinion; is that    15 what you'd want to know?</p> <p>16 Q. Yes.</p> <p>17 A. I was of the opinion that we've got to be safe.    18 Let's get out of here. Kill it. And so I said,    19 don't -- you know -- I didn't have an opinion because    20 I'm not an attorney. But I know what a Cease and Desist    21 letter is from an attorney. And I said just walk from    22 it.</p> <p>23 Q. That is you understood that there were    24 potential problems, even if Ms. Estrada was in the right    25 on the law, with going forward with her marketing in the</p>	<p>1 Q. What if there were a million dollars in sales?    2 MS. FUGATE: Same objection.    3 THE WITNESS: I already answered the question.</p> <p>4 BY MR. WILLIAMS:</p> <p>5 Q. I don't think you did.</p> <p>6 A. I said it doesn't matter whether the sales were    7 a hundred dollars or a thousand dollars, or a million    8 dollars. If you really think you're in the wrong, and    9 clearly the estate of Marilyn Monroe appeared to own the    10 rights to the name, then you got to walk from it.</p> <p>11 Q. If you appear to be in the wrong, meaning if    12 there are questions about whether or not you have a    13 right to market in a certain way?</p> <p>14 A. I don't understand what you're asking.</p> <p>15 Q. Let me try to clarify.    16 You said appear to be in the wrong; correct?</p> <p>17 A. Yeah.</p> <p>18 Q. Do you mean if you have concerns about whether    19 or not you own a piece of intellectual property that    20 you're selling?</p> <p>21 A. Okay. We were not concerned -- we knew and, in    22 fact, I think Alicia knew that there was a    23 possibility -- we knew that using the name    24 Marilyn Monroe on this particular dress could be a    25 problem, and the problem arose.</p>

1 value the contribution of intellectual property to a 2 particular design? 3 A. When you say "value," you mean give it a dollar 4 amount? When you say "value," the answer's no. 5 Q. Now, you use the word "value" in your report, 6 don't you? 7 A. I don't recall. Let me -- I'd have to go 8 through it. Oh, yes, I do. You're right. I use the 9 word "value," yes. 10 Q. What -- what did you mean when you say the word 11 "value" in your report? 12 A. A dollar amount. 13 Q. Now, apart from the Stop Staring issue that 14 arose -- I'm sorry, the Marilyn Monroe dress issue that 15 arose at Stop Staring, were there any other -- was there 16 any other work that you performed that was relevant to 17 opinion 1? 18 A. I did some trade dress work for her. And -- 19 and when I say "work for her," I mean I gave her advice. 20 Okay. It had to do with somebody who had a website 21 called Stop Staring. Needless to say, Stop Staring now 22 turned around and said, hey, you can't use that name, I 23 own it. And so -- actually, that's in settlement 24 conference at the moment because that did go into 25 litigation. And, you know, I was involved in her area	53	1 lawyer, did you provide her any other advice with 2 respect to this trade dress dispute? 3 A. No. This is a legal issue. 4 Q. With respect to the trade dress dispute, did 5 you perform any work involving calculating the value of 6 a design based on the intellectual property elements 7 that are a part of it? 8 A. What I did was when the issue came up, I 9 indicated to her how you -- one of the ways that you 10 determine value of her name and her look -- and I made 11 reference and showed her, you know, the consistency that 12 she had created in the way she branded herself, which 13 she did, and the consistency in her look. I explained 14 to her that has value. But I didn't put a dollar sign 15 on it, but I did use the word "value." 16 Q. And that's the value of a brand, not the value 17 of a design; correct? 18 A. That's correct. 19 Q. You'd agree with me that there are different 20 types of analyses? 21 A. The value of the brand is what I helped build 22 for her by different vehicles. The value of a specific 23 design is a subcomponent of the brand. But the brand is 24 the parent is what you really develop. 25 Q. Was the value of a particular design at issue	55
1 of do you know a good lawyer? What do you think I 2 should do? 3 And I, from the very beginning, said I'm not an 4 attorney, you have to talk to a good lawyer. So I gave 5 her some names. I always give clients three names and 6 told her to go see, you know, an attorney, which she 7 did. 8 And like I said, it's been about two years now 9 but it's -- it's in its final stages. It's -- 10 Q. With respect to the website, was she being sued 11 or was she suing? 12 A. She -- she was suing because this particular 13 incident, the people who had that website, also opened a 14 store in -- in Las Vegas in which they sold dresses that 15 were very similar, if not a mirror image, of what Alicia 16 was creating. Which is why it became a trade dress 17 issue, because the dresses were so much like the dresses 18 that Alicia created. And of course Alicia's website is 19 stopstaringclothing.com. So it had to do with both the 20 issue of the website use of the name, which was too 21 close to hers, and the fact that the store in Vegas was 22 selling dresses that were like Alicia's dresses. 23 Stop Staring dresses have a signature, there's 24 no doubt about that. 25 Q. Apart from your advising Ms. Estrada to find a	54	1 in the trade dress dispute that we were discussing? 2 A. The value of a particular design was not at 3 issue but rather the look that is her brand, the 4 statement that all of her designs make that is her 5 statement, that was at stake. It wasn't any one dress, 6 it was a whole bunch of dresses. 7 I don't remember the number of dresses, but it 8 wasn't one dress. It was a whole group of dresses that 9 created a whole image, a whole look which was her brand. 10 Q. Was there any apportionment analysis that you 11 conducted with respect to protected elements of 12 intellectual property and the other elements of the 13 design and how they led to value? 14 A. I decided not to be the expert on that case. 15 I'm pretty sure that she did get experts to do just 16 exactly that. But for reasons, because of my consulting 17 relationship, I said I would not do the expert witness 18 work and therefore would not be involved at all in 19 rendering any of such opinions. 20 Q. Apart from the litigation, did you, as a 21 consultant to her, perform an analysis of apportionment 22 of value between protected intellectual property 23 elements and other elements of the brand? 24 A. As her consultant, I did not do that. 25 Q. Were there any other -- was there any other	56



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1 work that you performed on behalf of Stop Staring that's 2 relevant to your opinions expressed in opinion 1 of your 3 expert report? 4 A. No. 5 Q. Stop Staring is a dressmaker; correct? 6 A. It's a junior dress house. 7 Q. They don't make T-shirts? 8 A. No. 9 Q. Do they place graphic designs on their dresses? 10 A. Nope. 11 Q. Different sort of business than OBEY Clothing? 12 A. Yes. 13 Q. In what ways was Stop Staring and their -- the 14 work that you performed on their behalf relevant to 15 opinion 2 of your report? 16 A. Oh, because Alicia donated a number of -- of 17 dresses to worthwhile charities. 18 Q. When you say "a number," what do you mean? 19 A. She donated a sizeable number. By that I mean 20 more than 10, but probably less than 50. But she 21 donated clothing, an assortment of dresses to charities. 22 Now, she may have done this more than once and 23 each time she's done that, it -- it's usually more than 24 10 but less than 50. 25 Q. On an order of magnitude, how much is each	57	1 THE VIDEOGRAPHER: Going back on the record. 2 The time is 9:54 a.m. 3 MR. WILLIAMS: Ms. Noble, I'd like to withdraw 4 the question I was asking before we went off the record 5 and ask this. 6 Q. Can you give me a rough order of magnitude of 7 how much these donations of dresses that Stop Staring 8 made would cost; that is, is it hundreds of dollars, 9 thousands of dollars, tens of thousands of dollars? 10 A. I would say that the cost to her was several 11 thousand, maybe \$2500. That's her cost. 12 Q. And same standard, rough order of magnitude, 13 what would the retail be? 14 A. Roughly \$7500. A low of 75 and a high of 15 10,000. 16 Q. Did you consult with Stop Staring on 17 specific -- on issues specifically related to the 18 donations of these dresses? 19 A. I consulted with her as follows. She would ask 20 me how do I deal with wanting to make a contribution in 21 the form of clothing to this cause? How do I deal with 22 that? How do I cost it? How do I -- 23 And I -- I would answer those questions. And 24 basically I always encouraged her to pursue her charity 25 causes by giving clothing donations.	59
1 dress worth? 2 A. Are we talking cost, wholesale or retail? 3 Q. Let's start with cost. 4 A. Okay. Her cost sheets are -- am I allowed to 5 give that information? I mean that's her private 6 information. I'm allowed. 7 Q. I think so. Your counsel can -- 8 MS. FUGATE: Well, could I just actually speak 9 with her briefly about that? 10 MR. WILLIAMS: Sure. And if -- while we're on 11 the record, if we need to mark something as 12 confidential, I have no objections to it. 13 MS. FUGATE: Okay. 14 MR. WILLIAMS: Do you want to go off the 15 record? 16 MS. FUGATE: Oh, yes. Please. 17 MR. WILLIAMS: Let's go off the record. 18 THE VIDEOGRAPHER: We're off the record. 19 The time is 9:52 a.m. 20 (Short recess.) 21 MR. WILLIAMS: Let's go back on the record and 22 I'll say that. 23 (Off record discussion.) 24 MR. WILLIAMS: We can go back on the record, 25 Ms. Noble.	58	1 Q. Why did you counsel her to pursue her charity 2 causes by giving donations? 3 A. If you ever met Alicia, it would be obvious. 4 Alicia came from not having enough money to pay 5 the grocery bill, okay. And this lady is -- is a 6 religious lady and also very grateful for what she's 7 accomplished. I mean, now she owns a building, she owns 8 a house and she's very grateful for all of that and 9 along the way has always said that I've got to help 10 others who are in need because, you know, God's been 11 good to me. I mean that's -- 12 And so I've always encouraged that because it's 13 part of who she is, it makes her a better person. And 14 if she's a better person she does better at creating her 15 product and so that's why I've encouraged it. 16 Q. Was it more something based in personal 17 considerations or business considerations? 18 A. Well, it certainly would help her business 19 because when you donate, the name of her brand is on the 20 garment. It's hanging there. It's on the hang tag. So 21 from a business point of view, it wasn't -- and from a 22 branding point of view, it wasn't ever going to hurt 23 her. The -- the cost of doing this was one that at this 24 point she could well afford. 25 Q. And -- I'm sorry.	60

1 classes on Tuesdays. I'm still on faculty, you know. 2 Q. Are you -- is there tenure there? Are you a 3 tenured instructor? 4 A. There is nothing like tenure. It's a private 5 institution. It's not related to the FIT in New York, 6 which is the State of New York college. It's not a 7 private school. There's no such thing as tenure. But 8 it works both ways because, you know, I've been 9 collecting Social Security and they still have me. 10 Q. I see. So you teach classes in 11 entrepreneurship, sales and marketing, purchasing and 12 inventory control, total quality management, production 13 planning and various other business-related subjects? 14 A. I do. 15 Q. What classes are you teaching this year? 16 A. This quarter I have got the -- there's an 17 advanced program for design students and they get 18 business -- they get business issues, so they learn how 19 to write a business plan and we talk about how you work 20 with your banker, how you raise money, what professional 21 associations you should join. So I'm teaching the -- 22 the advanced, third year design students. 23 And the other class is -- it's called "Costing 24 and Cost Control," which is how do you cost your 25 garment? In other words, how do you decide what you --	73	1 for the gifted kids and one class in the regular 2 curriculum right before they are about to graduate. 3 Q. In any of your classes, do you cover how to 4 apportion the value of a design with respect to 5 intellectual property protected elements? 6 A. Using the word "value," the answer is no. 7 Q. Using any other words? 8 A. I talk about the value of their design in terms 9 of protecting it. We talk about copyrights, trademarks, 10 I generally bring in an attorney as a guest speaker so 11 that my students learn about copyrighting and -- and 12 trademark -- copyright infringement and trademark 13 infringement. We talk about, you know, the legislation 14 that's going on right now about wanting to cover 15 designers for three years and protect their designs. We 16 talk about the value of their design and why you need to 17 protect it and what you can do to protect it or not 18 protect it and so forth. 19 But I don't talk about dollars. 20 Q. Do you talk about apportionment? 21 A. No. 22 Q. In your classes, do you cover the cost of 23 philanthropic merchandising? 24 A. I make reference to philanthropic merchandising 25 in a general form. But not a specific form.	75
1 what the cost is on the shirt you're wearing, then 2 what's the wholesale on it and what are the components? 3 And how -- that's only part of it. And then how do you 4 run a business so that you don't lose money. All the 5 processes in the business that enable you to stay 6 profitable or if you don't do them, you'll lose money. 7 I cover the infrastructure of an apparel 8 company, what departments do you need to have, and what 9 are the functions of each department and why are they 10 needed and who works in them. I cover what is a cost 11 sheet, why do you need a cost sheet, what's on a cost 12 sheet, how do you do a cost sheet? 13 I mean all those issues related with 14 profitability and running an apparel company. And every 15 quarter, you know, you get -- that school's on the 16 quarter system. And since I'm only able to give them 17 one day a week, they -- you know, every quarter I kind 18 of change. 19 Like next quarter I get the students that are 20 doing the international product development program. 21 And they get a course called "Industry Practices." And 22 that's like business management type stuff. And I'll 23 probably get purchasing and inventory control, one of 24 them, you know. 25 So I have one class in that advanced program	74	1 Q. What do you mean? 2 A. I mean in -- in general, especially under 3 business practices, we talk about the fact that the 4 garment industry is known to support the major causes by 5 donating clothing and then we talk about what that means 6 in terms of additional costs and where the additional 7 costs might occur. 8 Q. When you talk about additional costs that may 9 arise from philanthropic merchandising, do you use a 10 textbook? 11 A. No. 12 Q. Do you use any reference materials? 13 A. No. The only reference material would be if I 14 have an attorney who comes to class and whatever they 15 learn from the attorney becomes their form of reference. 16 In other words, they don't have a text, but your brain 17 power is their text for that day for the attorneys. 18 Q. Now, that's the case with respect to the 19 intellectual property issues; correct? 20 A. (No audible response.) 21 Q. Yes? 22 A. Yes. That's -- sorry. Yes. That's copyright 23 issues and trademark issues. And they also -- they 24 learn, you know, what's the difference between a patent, 25 a copyright, a trademark. And they learn the	76

1 as -- as getting from the protectable elements in this 2 particular -- from this particular photograph. 3 There was nothing in those elements that I 4 could assign a dollar to to give it any value in -- in 5 the sale of this T-shirt -- this merchandise. That's 6 how I meant it. 7 Q. What factors could you assign a dollar to? 8 A. Certainly none to the protectable elements. 9 Q. I understand that. 10 If your opinion is -- and you're going to tell 11 the Court and the jury -- that you could assign no value 12 to the protectable elements of the Garcia photo, what 13 elements could you assign a quantifiable value to? 14 A. I can't quantify, but I could tell you I would 15 put value on Mr. Obama's face that was stuck on the 16 Obama -- on the -- on the OBEY merchandise. And I kept 17 saying that that's what drove this merchandise, was 18 Obama. 19 Q. Beside Mr. Obama's face on the merchandise, 20 what else could you attribute value to? 21 A. Like I said, there are some other factors. 22 They're minor, very minor, relative to the big picture 23 being Obama. 24 The minor factors would be the way they 25 promoted it in both giveaways and others. Like we said,	169	<p>1 would that be a different analysis? 2 A. Can't answer that. I was only asked to get 3 involved with this particular image, and so I'm keeping 4 my opinions to this particular image that -- that was 5 given to me, presented to me. 6 Q. As an expert in the fashion industry, you 7 cannot offer an opinion as to whether or not a different 8 Obama photo, or a different Obama image, on the T-shirt 9 would be as valuable? 10 A. I don't know what -- 11 MS. FUGATE: Object. Objection. 12 Argumentative. Also incomplete hypothetical. 13 You may answer. 14 THE WITNESS: You know, I don't know what the 15 other picture would look like. I mean, what if it's a 16 dumb picture of Obama? And even if it was a good 17 picture, I have no history. 18 You see, I've got history here. He sold two 19 million two hundred and seventy-plus thousand dollars, 20 236,000 units. That's history. I can give an opinion 21 when I have that kind of history. 22 I don't have a history on some other photo. I 23 don't have it. 24 BY MR. WILLIAMS: 25 Q. Would you agree with me that a better image</p>	171
1 posters and pictures; the way they market it; the way -- 2 relationships they had with their retailers or their 3 accounts; the way that they push that production 4 through; the way they did all the extra work that it 5 takes to make things happen, which they did. Okay. 6 But those are all minor factors. Like I said, 7 they're -- it's like an -- anything in life; it's never 8 any one thing. 9 There's always one major thing that makes it 10 happen. In this case Obama made this happen. But 11 there's other small minor factors that I just listed for 12 you. 13 Q. Besides those other small minor factors that 14 you just referenced, were there any others? 15 A. At the moment, I can't think of any others. 16 Q. How is it that you can determine that those are 17 minor factors in comparison to the value of Mr. Obama's 18 face on the T-shirt? 19 A. Because that's what was happening. Because 20 Mr. Obama is what drove this. People bought this 21 because of Obama. Like I said, if it had your face or 22 my face, they wouldn't have bought it even if they had 23 good buyer relationships. 24 But everybody -- that's what was happening. 25 Q. If it were a different picture of Mr. Obama,	170	<p>1 would lead to more value? 2 A. How do you decide what's a better image? This 3 image must have been pretty good. This is a pretty good 4 image, wouldn't you say? 5 It worked. 6 Q. You're not going to offer any other testimony 7 about whether there are better or worse images than that 8 for purposes of this case? 9 A. No, I'm not going to make any reference to 10 better or worse images. No. I'm -- we're talking about 11 this image. 12 Q. How about more marketable images, can you offer 13 any opinions on whether or not a different image would 14 have been more marketable? 15 A. I'm not going to offer an opinion on that -- 16 Q. If there were -- 17 A. -- because I have no history on it. 18 Q. If there were an unflattering image of 19 Barack Obama, would that have been more or less 20 marketable in your view? 21 A. Now, come on. That's like saying if you know 22 you put schmutz on something. 23 In light of the fact that I won't give an 24 opinion on any other image other than this one, I would 25 have to say that without any quantifiable history that I</p>	172

1 can use to support the fact that this particular image 2 was successful, you know, then I won't give an opinion. 3 Q. It's your testimony that people purchased Obama 4 merchandise because it made them feel good and this 5 filled an emotional need. Correct? 6 A. I said when it comes to the motives for buying 7 T-shirts, that this motive of making them feel good was 8 certainly applicable in this particular case. Yes. 9 Q. It's your testimony that people purchased Obama 10 merchandise to impress others and to be accepted by 11 friends and peer groups; correct? 12 A. Yes. 13 Q. It's your testimony that people purchased the 14 Obama merchandise to be fashionable; correct? 15 A. Yes. 16 Q. Would you agree with me that people purchased 17 the Obama merchandise because they were swept up in a 18 fervor relating to President Obama's candidacy? 19 A. Yes, they were caught up in -- in that fervor, 20 yes. That was part of what was going on. 21 Q. In light of that testimony, can you offer an 22 opinion as to whether or not an unflattering image of 23 President Obama would be more or less valuable as a 24 design? 25 A. But, you see, I -- I can't because they bought	173	1 Q. Yes. 2 A. Well, there's always people who don't want -- 3 who didn't like him, and they might have bought it. 4 Q. Would that have been a more valuable design or 5 a less valuable design in your view? 6 MS. FUGATE: Objection. Vague. Also 7 incomplete hypothetical. 8 THE WITNESS: You know, how do you judge a 9 design? It could have been a beautiful design from a 10 point of view of creating a design. That's a different 11 issue altogether. Okay. And it could have been a 12 perfectly good design. Technically it could have been a 13 good design. 14 But because it was derogatory and it didn't -- 15 and -- you know, it said not nice things about Obama, 16 people wouldn't buy it. 17 But it could have been a beautiful design from 18 a technical point of view. 19 BY MR. WILLIAMS: 20 Q. From the view of the fashion industry, which is 21 your area of expertise, would it have been a more 22 marketable design or a less marketable design? 23 A. If -- 24 MS. FUGATE: Same objections. 25 THE WITNESS: Yeah, even as an apparel expert,	175
1 this particular because of -- we said because of what -- 2 the fervor of what was happening with Obama and -- in 3 the year two hundred -- 2008; right? They bought it 4 because this -- this was on merchandise that they liked, 5 that -- they were very easy silhouettes, meaning 6 easy-to-wear clothing, and they got caught up in the 7 fervor and they bought this one now. 8 Now, if it was really, really ugly, do you 9 think -- when they loved and admired and wanted to get 10 caught up in this ambience, do you think they would buy 11 something that's truly not complimentary and that's 12 really ugly? 13 Q. You tell me, Ms. Goldaper. 14 A. If it's really ugly, I would say that they 15 would prefer not to buy it -- unless this is the only 16 thing that's valuable, which wouldn't be the case. 17 You're creating a scenario that's not real. 18 But if it's really ugly, in a real scenario 19 where there are better ones around, they won't buy the 20 ugly one. This was not ugly. 21 Q. Based on the opinions that you've provided in 22 your report, would people be less likely to purchase a 23 design if it were derogatory toward Mr. Obama? 24 A. Would they be less likely to buy it if it was 25 derogatory?	174	1 okay, you're asking me to say if something is ugly, 2 hideous, derogatory, is that easy or harder to sell. 3 Well, you don't have to be a fashion expert to know the 4 answer to that. 5 If it's ugly history -- I mean ugly and not 6 nice and derogatory, it's not going to sell. Because 7 it's ugly and it's derogatory. It's not going to sell. 8 Q. I'm not asking whether something derogatory, 9 Ms. Goldaper. Let's see if you can follow along with me 10 here. 11 If there were a design that portrayed 12 President Obama in a derogatory fashion, in your view 13 would have been more or less valuable than the 14 design that was on the Obama merchandise? 15 MS. FUGATE: Objection. Incomplete 16 hypothetical. 17 THE WITNESS: Having no history on the sale of 18 that garment, I can't answer the question. 19 BY MR. WILLIAMS: 20 Q. Now, you've testified about the market for the 21 Obama merchandise; correct? 22 A. The market. 23 Q. Yes. 24 A. Yes. The young people are buying it. That's 25 the market.	176



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<p>1 A. Uh-huh.</p> <p>2 Q. It is your opinion that the posing of</p> <p>3 President Obama in the Obama photograph did not</p> <p>4 contribute in any way to the value of the design of the</p> <p>5 Obama merchandise; correct?</p> <p>6 A. First of all, I maintain that the element</p> <p>7 that's protected here, the posing, Shepard Fairey</p> <p>8 testified that he changed it.</p> <p>9 Q. We can get to that, but I'm asking you a more</p> <p>10 basic question.</p> <p>11 Based on the testimony that we've already</p> <p>12 established, you provided in your expert report that</p> <p>13 even if the jury were to find that each of the protected</p> <p>14 elements were incorporated, that the Obama photo still</p> <p>15 would not have contributed anything to the design.</p> <p>16 Okay?</p> <p>17 A. We're not talking about the photo, we're</p> <p>18 talking about the elements now. Right? Of the photo.</p> <p>19 Q. We're talking about the elements of the photo;</p> <p>20 correct?</p> <p>21 A. Yes.</p> <p>22 Q. So let me just make sure that I have your</p> <p>23 testimony clear on this, Ms. Goldaper.</p> <p>24 Is it your testimony that even if</p> <p>25 Shepard Fairey incorporated each of the protectable --</p>	<p>185</p> <p>1 elements of this photograph still contributed zero to</p> <p>2 the design -- value of the design of the OBEY</p> <p>3 merchandise?</p> <p>4 A. Yeah. You have a different issue then -- then,</p> <p>5 you know -- but, yes, I still believe what I wrote,</p> <p>6 which is that even if he hadn't made all the changes in</p> <p>7 this particular case because it's clothing -- and not a</p> <p>8 poster but because it's clothing and -- that -- that the</p> <p>9 consumer would have still bought it.</p> <p>10 And -- and I still would have contributed --</p> <p>11 attributed no value to the protectable elements.</p> <p>12 Q. What do you mean because it's clothing and not</p> <p>13 a poster?</p> <p>14 A. Well, because, you know when you look at a</p> <p>15 poster, the composition of a poster and what visually</p> <p>16 draws you to it, perhaps then the protectable elements</p> <p>17 could be a factor. But the visual elements of what</p> <p>18 this -- what the consumer looks at here is what we call</p> <p>19 the elements of design, which is what draws your eye.</p> <p>20 Every item -- everything has to have what we</p> <p>21 call an element of design. That's the focal point. And</p> <p>22 in this case that's right here. And not in the</p> <p>23 peripheral area of -- of -- of the protectable elements.</p> <p>24 The eye is drawn to this item of clothing by</p> <p>25 the element of this design, which in this case is</p>
<p>1 protectable elements of the Obama photo, that the photo</p> <p>2 still would have contributed zero to the value of the</p> <p>3 design of the Obama merchandise?</p> <p>4 A. I don't know.</p> <p>5 Q. Could you turn to paragraph 25 of your report.</p> <p>6 Turn to the top of page 10, please.</p> <p>7 At the top of page 10, you say:</p> <p>8 "I --</p> <p>9 A. Oh, yeah.</p> <p>10 Q. " -- believe this to be true even if a judge or</p> <p>11 jury were to determine that Fairey incorporated each of</p> <p>12 the protected elements into the Obama image."</p> <p>13 Correct?</p> <p>14 A. I still believe it.</p> <p>15 Q. Now, when you say, "I believe this to be true,"</p> <p>16 you're referring to your conclusion that it was the</p> <p>17 likeness of Barack Obama that led people to purchase the</p> <p>18 merchandise produced and distributed by OBEY Clothing</p> <p>19 and not any of the protected elements of the Obama</p> <p>20 photograph that might have been used in the image;</p> <p>21 correct?</p> <p>22 A. That's correct. I still believe it.</p> <p>23 Q. So you believe that even if Shepard Fairey</p> <p>24 incorporated each of the protectable elements of this</p> <p>25 photograph into the OBEY image, that the protectable</p>	<p>186</p> <p>1 Mr. Obama. They're using him as the focal point of</p> <p>2 their design.</p> <p>3 Q. Do you consider President Obama's gaze in the</p> <p>4 Obama image to be a part of that focal point?</p> <p>5 MS. FUGATE: Objection. Vague.</p> <p>6 THE WITNESS: The answer is the same.</p> <p>7 BY MR. WILLIAMS:</p> <p>8 Q. It's a different question, Ms. Goldaper. Let</p> <p>9 me repeat it and we'll see.</p> <p>10 Do you have the Obama image in front of you?</p> <p>11 A. This -- you mean this one?</p> <p>12 Q. I mean the image. Not the photograph but the</p> <p>13 image. Do you have it in front of you?</p> <p>14 A. This one?</p> <p>15 Q. Yes.</p> <p>16 A. Yes.</p> <p>17 Q. You see that there is a gaze?</p> <p>18 A. Yes.</p> <p>19 Q. It's a gaze off into the distance; yes?</p> <p>20 A. Shepard Fairey did a great job in -- in, you</p> <p>21 know, using that photo as a resource to create this</p> <p>22 picture, artwork, that was put on clothing.</p> <p>23 Q. You know, I asked you the question, it's a gaze</p> <p>24 off to the distance, and your answer was:</p> <p>25 "Shepard Fairey did a great job in, you know,</p>

<p style="text-align: right;">189</p> <p>1 using that photo as a resource to create this picture, 2 artwork, that was put on clothing"; right? 3 A. Yeah. I mean, he just -- he catches your eye. 4 He catches your eye. And whether it's the pose or 5 whether it's, you know, the way he structured -- 6 restructured the ear or the chin, he just got your eye. 7 Q. Well, let's talk about what aspects of the 8 Obama image catch your eye. 9 As a fashion expert, what elements of the 10 image -- 11 A. Okay. As a fashion expert -- 12 Q. -- contributed to the value? 13 A. -- I can tell you -- I can only look at the 14 total picture. I can't rip it apart. I can't take all 15 the different components. 16 This pictures is so good because of the way he 17 worked with all -- the pose -- the way he made this 18 artwork, the way he created it. 19 And that's what made it so great, the way he 20 did it. And that total picture is what caught the 21 consumer. That's the -- the focal -- focus of the 22 design. 23 Now, you're asking me: Is it the nose? Is it 24 the gaze? Is it the eyes? 25 I don't know which one of the elements of this</p>	<p style="text-align: right;">191</p> <p>1 photo? 2 A. I can't give you a -- an -- an opinion. I'm -- 3 I -- I can say -- 4 I cannot give you an opinion on the individual 5 elements of this particular -- of -- of this picture or 6 that photo, you know, whether it was better on this 7 photo than on that. 8 Q. My question was different, Ms. Goldaper. I 9 asked you, and you do give an opinion, as to whether or 10 not the Obama image is more eye-catching than the Obama 11 photo. 12 MS. FUGATE: Objection. Vague. Incomplete 13 hypothetical. 14 THE WITNESS: I can't answer that, either, 15 because, you know, on the clo -- I -- I can't answer 16 that. I can't give you an opinion on that. I know that 17 there's history on this -- quantifiable history on this. 18 BY MR. WILLIAMS: 19 Q. What do you mean by quantifiable history? 20 A. 236,000 units were sold of this merchandise 21 with this image on it. Okay. I don't have any -- I 22 don't know if you put this picture on the same 23 merchandise if it would have sold just as well. I don't 24 know. 25 Q. Is the fact that 235 units were sold an</p>
<p style="text-align: right;">190</p> <p>1 particular creation it is. It's that full image of 2 Obama. 3 And, furthermore, it was the full image of 4 Obama because -- you know, these young people, I mean, 5 they say that 59 percent of the young -- of the vote was 6 in the under 30 guy -- people. I mean, the young people 7 were drawn to this man. 8 Well, they didn't look at the gaze or the pose, 9 you know. They looked at this image on this T-shirt; 10 they loved it; they wanted to wear it. And, you know, 11 whether the chin was any better than this chin, or the 12 ear was any better than that ear was not the way these 13 consumers bought it. They bought it because they were 14 in love with that. They wanted to be a part of it. 15 Q. You can't offer any testimony or any opinions 16 with your expertise as to whether or not this design, 17 the Obama image, would have been more or less 18 eye-catching if the tilt of President Obama's head were 19 different? 20 A. I couldn't give you an opinion on that, no. 21 Q. How about the direction of President Obama's 22 gaze? 23 A. I couldn't give you an opinion on that, either. 24 Q. Can you give me an opinion as to whether or not 25 the Obama image is more eye-catching than the Obama</p>	<p style="text-align: right;">192</p> <p>1 important fact for the opinions that you offer in your 2 expert report? 3 A. It's 236,000 units. That's a big difference 4 from 235 units. 5 Q. Is the fact that 236,000 units were sold an 6 important fact for the opinions that you offer in your 7 expert report? 8 A. It gives me history. It validates that this 9 was an item that the consumers wanted and did buy. 10 Q. Important fact or not important fact? 11 A. It -- it was one of many factors. So, yes, it 12 was an important factor. 13 Q. Do you reference those sales in your expert 14 report? 15 A. Hmm. I don't remember. 16 Q. Could you please check? 17 A. I don't remember. But I know that I've read -- 18 but everybody's deposition has it over and over again. 19 I -- I don't see a reference to it at the 20 moment in my opinion. However, I did -- it was part of 21 the background information that I've made reference to 22 here today that I used in, you know, arriving at my 23 opinion. 24 Q. Ms. Goldaper, I'm asking a different 25 question -- because we've already discussed your expert</p>

<p>1 report in detail -- whether or not the sales of the  2 Obama merchandise were an important fact that led to  3 your opinions in this case.  4 And that's why I'm asking you whether you  5 included that fact in your expert report.  6 Now, I'll give you the time that you need to  7 look through your expert report. But if it's not in  8 there, I'd like you to be honest and just tell me no.  9 A. I don't believe it's in here. Okay.  10 Q. Would you like to check?  11 A. I -- I will double-check, but I don't believe  12 that I used that information. Although I was aware of  13 it, I don't believe that I used it.  14 I don't see where I've used it. But I know  15 that I -- I used it at arriving at my opinion. I used  16 that information.  17 I mean, there's stuff that I read that I didn't  18 include in my opinion. I'm not right now able to quote  19 you what it is, but that's an example. The fact that  20 they -- their sales were what they were.  21 Q. Ms. Goldaper, do you remember earlier in this  22 deposition, I asked you while you were under oath  23 whether you included all the facts that you believe  24 support your opinions in your expert report?  25 A. Ye- --</p>	<p>193</p> <p>1 But I also am not sure whether -- that was in  2 Adam's deposition. Adam -- in the accountant's  3 deposition. And I'm not so sure that I read -- I think  4 I read his deposition after I wrote this document.  5 Because he was the numbers guy, and that's where I got  6 my numbers from. And that's where I learned -- there  7 you go. I don't think I read that before I wrote the  8 document.  9 If it was -- it's in Adam's deposition, and I  10 don't think I read Adam's deposition before I wrote this  11 document.  12 Q. Do you remember when I asked you earlier today  13 whether any of the materials you've read subsequently  14 have prompted you to want to revise or amend your  15 report?  16 A. Yes, you did ask me that.  17 Q. And what was your answer?  18 A. I said no, I didn't need to revise it.  19 Q. Do you need to revisit that answer as well?  20 A. I've got enough in here that I feel supports my  21 opinion. I mean, I don't have to add any more. I mean,  22 this is a different situation. You're now deposing me  23 and I'm giving you information. Okay.  24 When I was writing this, I was writing an  25 opinion based on what was given to me at that point.</p>
<p>1 MS. FUGATE: Objection. Argumentative.  2 THE WITNESS: Yes.  3 BY MR. WILLIAMS:  4 Q. Do you remember what your answer was to that  5 question?  6 A. Yes. I said I -- I had included all the facts.  7 Q. Do you need to revisit that answer?  8 A. No. I -- I don't feel that -- if I omitted  9 something, there's no way I humanly could have included  10 everything that's known in this universe about this  11 particular situation.  12 I included in here the facts that I needed to  13 include in order to express my opinion.  14 Q. My question to you earlier was: Did you  15 include all of the facts that you believe support your  16 opinions in your expert report? Correct?  17 A. Yes.  18 Q. And your answer to that question was yes;  19 correct?  20 A. Yes.  21 Q. Was that a true answer?  22 A. If you're saying that because I didn't include  23 the -- the units that were sold or the dollars that were  24 involved, if you're saying that because I didn't include  25 that, it isn't a true answer, I'll buy that.</p>	<p>194</p> <p>1 Q. Could you have asked for the unit sales of the  2 Obama merchandise when you were drafting your report?  3 A. I --  4 MS. FUGATE: Objection. Calls for speculation.  5 THE WITNESS: Yeah, I could have, but I didn't.  6 BY MR. WILLIAMS:  7 Q. Do you know whether that information was  8 unavailable?  9 A. I don't know. I'm -- I hadn't gotten to Adam's  10 deposition.  11 Q. You've testified that the unit sales are an  12 important fact; correct?  13 A. They are a factor that validates the revenues  14 in and the activities of this merchandise.  15 Q. Are you going to rely on that fact even though  16 you didn't put it in your expert report, Mrs. Goldaper?  17 A. What do you mean by "rely on that fact"? I've  18 got enough in here that -- you know, you want me to  19 exclude it, I'll exclude it. There's enough in here  20 that I have used to rely on my opinions.  21 Q. Would you agree to rely only on what you've  22 placed in your expert report?  23 MS. FUGATE: Objection. Argumentative.  24 THE WITNESS: I would have to ask the attorneys  25 whether I should be doing that, because I don't</p>

<p>1 from the point of view of the garment industry in terms  2 of what account -- what makes consumers buy something,  3 what makes a consumer purchase goods.</p> <p>4 And in that sense, I gave zero value to the  5 protected element. And in that sense, I am qualified,  6 because I've been in the industry and worked with -- you  7 know, at both ends, wholesale, retail, consumers,  8 buyers, and I've used the motives for consumer  9 purchasing as a basis for arriving at that.</p> <p>10 Q. You have no background in art history; correct?</p> <p>11 A. That is correct.</p> <p>12 Q. You're not putting yourself out as an expert in  13 art history; correct?</p> <p>14 A. I am definitely not doing that. That's  15 correct.</p> <p>16 Q. You have no background in art -- art  17 appreciation; correct?</p> <p>18 A. That's correct.</p> <p>19 Q. Not putting yourself out as an expert on art  20 appreciation; correct?</p> <p>21 A. Yes, that's correct.</p> <p>22 Q. No background in photography; correct?</p> <p>23 A. That's correct.</p> <p>24 Q. Not putting yourself out as an expert in  25 photography; correct?</p>	201	<p>1 A. It's one of the areas that I'm able to speak  2 to, okay, based on having worked in the industry and  3 have had the experience over 40-plus years of working  4 with both the buyer and the consumer.</p> <p>5 So based on that, it is one of the areas unlike  6 graphics, unlike photography, un- -- unlike art, that  7 I'm able to address and speak to. Okay.</p> <p>8 Q. What other areas can you speak to?</p> <p>9 A. I can talk to you about the construction of  10 garments; I can talk to you about the pricing of  11 garments; I can talk to you about international and  12 domestic sourcing of garment production.</p> <p>13 I mean, I can go on. I can talk to you as an  14 expert on quality control, on standards of quality in  15 our industry. I can talk to you about shipping and  16 warehousing standards in the apparel industry.</p> <p>17 Want me to keep going?</p> <p>18 Q. Ms. Goldaper, are any of those subjects  19 pertinent or at all relevant to the subject of your  20 expert opinions?</p> <p>21 A. No. But some of them are integrated. You  22 know, they're a part of who I am as an expert. They're  23 part of the composition of where my 45 years of working  24 in the industry have been able to speak to certain  25 issues, like the habits of consumers and/or the buyers</p>	203
<p>1 A. That's correct.</p> <p>2 Q. Are you holding yourself out as an expert in  3 graphic design?</p> <p>4 A. I am not holding myself out as an expert in  5 graphic design.</p> <p>6 Q. Do you believe that you are an expert in  7 graphic design?</p> <p>8 A. I don't believe I'm an expert in graphic  9 design.</p> <p>10 Q. Are you holding yourself out as an expert in  11 design more generally?</p> <p>12 A. I am not here as an expert in design the way we  13 talk about design in the garment industry. I am not a  14 designer; I am not an expert in the creative process.</p> <p>15 I am an expert in the garment industry as it  16 relates to buying habits of both the retail buyer and  17 the consumer as a buyer.</p> <p>18 Q. Did you say you were holding yourself out as an  19 expert as to the buying habits of both the retail buyer  20 and the consumer as a buyer?</p> <p>21 A. Yes. As it applies to buying apparel.</p> <p>22 Q. I just want to make sure that we have this  23 clear. Your expertise today is as an expert in the  24 buying habits for the retail buyer and consumer as a  25 buyer as it relates to the buying of apparel; correct?</p>	202	<p>1 who buy for their retail stores.</p> <p>2 Q. Ms. Goldaper, apart from your purported  3 expertise and the buying habits of the retail buyer and  4 consumer as a buyer as it relates to the buying of  5 apparel, what other areas of expertise do you have that  6 are relevant to the opinions that you put forward in  7 this case.</p> <p>8 A. Well, I've said that the overhead cost  9 attributable to creating specialized merchandise to be  10 sold for philanthropic purposes, as Obama merchandise  11 was intended to be, are generally greater than those  12 attributable to merchandise that's sold for profit.</p> <p>13 So I can talk to you about the extra cost of  14 production, the extra cost of selling, the extra cost of  15 merchandising, the extra cost of sampling, all of which,  16 by the way, are in the same territory that I just  17 addressed and just listed on my fingers as areas of  18 expertise that I know from my 45 years of working in the  19 industry.</p> <p>20 Q. Let's come back to that in a moment and limit  21 my question to opinion No. 1.</p> <p>22 Apart from your purported expertise and the  23 buying habits of the retail buyer and consumer as a  24 buyer as it relates to the buying of apparel, are there  25 any other areas of expertise that are relevant to the</p>	204

<p>1     opinions that you put forward in opinion 1?</p> <p>2     A. No. I would say you've got it.</p> <p>3     Q. Now let's turn to opinion No. 2. Okay. As a</p> <p>4     matter of fact, let's hold off on opinion No. 2. We'll</p> <p>5     get to that when we talk about opinion No. 2.</p> <p>6         And we will get there, Ms. Goldaper.</p> <p>7     A. I'm counting on you.</p> <p>8     Q. You have no legal expertise; correct?</p> <p>9     A. None.</p> <p>10    Q. You relied entirely on counsel for any legal</p> <p>11    elements or legal analysis that was included in your</p> <p>12    expert report; correct?</p> <p>13    A. Yes.</p> <p>14    Q. If counsel's legal interpretation is incorrect,</p> <p>15    then your report will be incorrect to the extent it</p> <p>16    relies on those interpretations; correct?</p> <p>17    A. Yes.</p> <p>18    Q. If you misunderstood counsel about what they</p> <p>19    were telling you about legal issues, then to the extent</p> <p>20    that you relied on understandings that were inaccurate,</p> <p>21    your report would also be flawed; correct?</p> <p>22    A. Yes.</p> <p>23    Q. Do you have any understanding of what elements</p> <p>24    of Goldaper No. 5 are unprotected?</p> <p>25    A. The image of Obama, the subject.</p>	205	<p>1     A. Right.</p> <p>2     Q. -- of the photograph in your report; right?</p> <p>3     A. Yes. And I also said somewhere in my report in</p> <p>4     summary that -- that -- that, therefore, I -- I assume</p> <p>5     something -- I don't know where it is, but I know I</p> <p>6     wrote it. That, therefore, The Associated Press</p> <p>7     wouldn't have a -- a copyright to his image.</p> <p>8     Q. Well, Ms. Goldaper, I'm not asking you to</p> <p>9     testify about what particular things you said in your</p> <p>10    report. I want to understand that when you used the</p> <p>11    word "protectable elements," what it was that you were</p> <p>12    referring to.</p> <p>13    A. I'm going to read.</p> <p>14    Q. Okay.</p> <p>15    A. "In other words, I am assuming that</p> <p>16    The Associated Press cannot own a copyright in O --</p> <p>17    Barack Obama's likeness itself."</p> <p>18    Q. My question for you would be: When you wrote</p> <p>19    that, were you referring to the fact that Barack Obama</p> <p>20    is in this photo or Barack Obama's likeness as it</p> <p>21    appears in this photo?</p> <p>22         MS. FUGATE: Objection. Vague.</p> <p>23         THE WITNESS: It's his likeness because the</p> <p>24    man's not in the room. It's got to be his likeness, a</p> <p>25    picture of him. You know, in other words -- exactly</p>	207
<p>1     Q. That is the fact that it has Barack Obama in</p> <p>2    it; correct?</p> <p>3     A. I -- yeah. I believe that his face, his</p> <p>4    picture -- his face, you can't -- his face is -- is not</p> <p>5    protectable.</p> <p>6     Q. Well, this particular likeness of his face you</p> <p>7    understand could be protectable; correct?</p> <p>8         MS. FUGATE: Objection. Calls for a legal</p> <p>9    opinion.</p> <p>10    THE WITNESS: That's correct. I don't know.</p> <p>11    I -- I don't know what you're saying.</p> <p>12    BY MR. WILLIAMS:</p> <p>13    Q. What do you mean when you say "his face"? Do</p> <p>14    you mean his face as it appears in that picture?</p> <p>15    Let me ask a different question.</p> <p>16    Are you saying that you believe the fact that</p> <p>17    Barack Obama's picture is not protectable or that his</p> <p>18    face, the image of his face in the photo, is not</p> <p>19    protectable?</p> <p>20         MS. FUGATE: Objection. Calls for a legal</p> <p>21    opinion.</p> <p>22         THE WITNESS: Yeah. I don't know what the law</p> <p>23    says, but --</p> <p>24    BY MR. WILLIAMS:</p> <p>25    Q. Well, you referred to the protected elements --</p>	206	<p>1     what I wrote here is what I believe.</p> <p>2         The only protected -- I am assuming that --</p> <p>3         "I am assuming that only the photographer's</p> <p>4    original conception of the subject of the photograph,</p> <p>5    not the subject itself is copyrightable."</p> <p>6         That's my language. That's what I understand.</p> <p>7         Q. That is, Barack Obama is not copyrightable --</p> <p>8         A. I -- I --</p> <p>9         Q. -- but the photograph is; correct?</p> <p>10         A. Don't put words in my mouth.</p> <p>11         I am assuming that the only photog- -- that</p> <p>12    only the photographer's original conception of the</p> <p>13    subject of the photograph, not the subject itself. If</p> <p>14    the subject itself is Barack Obama, then that's what I</p> <p>15    mean.</p> <p>16         Q. I'm not trying to put words in your mouth,</p> <p>17    Ms. Goldaper, but I'd really like to understand what</p> <p>18    those words meant when you wrote them.</p> <p>19         A. Hey, man, I don't know how to say it any other</p> <p>20    way.</p> <p>21         Q. Well, let me see if I can help. Okay?</p> <p>22         When you were writing those words, did you mean</p> <p>23    to say that The Associated Press cannot own an</p> <p>24    intellectual protected property interest in the fact</p> <p>25    that Barack Obama appears in the picture?</p>	208



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<p>1 consumers about their preferences?</p> <p>2 A. You don't do that even in -- in real life until</p> <p>3 after -- in a case like this.</p> <p>4 The answer is no.</p> <p>5 Q. Remember we were talking about your textbook?</p> <p>6 A. Umm.</p> <p>7 Q. That was the Frings textbook; right?</p> <p>8 A. Uh-huh -- yes.</p> <p>9 MR. WILLIAMS: Would you please mark this,</p> <p>10 Ms. Noble.</p> <p>11 (Deposition Exhibit 6 was marked for</p> <p>12 identification by the court reporter.)</p> <p>13 BY MR. WILLIAMS:</p> <p>14 Q. Ms. Goldaper, you've just been handed a copy of</p> <p>15 photocopied excerpts of "Fashion from Concepts to</p> <p>16 Consumer, 9th Edition, by Gini Stephens Frings."</p> <p>17 Do you see that?</p> <p>18 A. Yes. But you know I referenced the</p> <p>19 7th edition.</p> <p>20 Q. I think you referenced the 9th edition in your</p> <p>21 report as well.</p> <p>22 But if you like I can probably get a copy of</p> <p>23 the 7th edition.</p> <p>24 A. There's not much difference, but the pages are</p> <p>25 going to be different.</p>	<p>1 right?</p> <p>2 A. Yes.</p> <p>3 Q. And you stated that those were appropriate</p> <p>4 methodologies for determining consumer preference at the</p> <p>5 existing product stage; correct?</p> <p>6 A. Correct.</p> <p>7 Q. But you didn't conduct any review of sales</p> <p>8 records; correct?</p> <p>9 A. Correct.</p> <p>10 Q. And you didn't conduct any trend analysis;</p> <p>11 correct?</p> <p>12 A. That's correct.</p> <p>13 Q. In fact, the entire basis for your opinion</p> <p>14 relating to consumer preferences is based on your own</p> <p>15 impressions about the market; correct?</p> <p>16 A. I don't have the -- the -- the numbers to back</p> <p>17 it up other than, you know, the sales records, which I</p> <p>18 got after I read -- wrote the opinion.</p> <p>19 Q. My question was different. It's not asking</p> <p>20 whether you have numbers to back it up. I'm asking</p> <p>21 whether the totality of your opinions about consumer</p> <p>22 preferences that appears in your expert report is based</p> <p>23 on your impressions about the industry.</p> <p>24 A. Correct.</p> <p>25 Q. You didn't, for example, conduct market</p>

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<p>1 A. That's correct.</p> <p>2 Q. Didn't make any inquiries by mail; correct?</p> <p>3 A. Yes.</p> <p>4 Q. Did you hire any outside researchers?</p> <p>5 A. No.</p> <p>6 Q. Did you conduct any telephone surveys?</p> <p>7 A. No.</p> <p>8 Q. Did you conduct any mail surveys?</p> <p>9 A. No.</p> <p>10 Q. Did you survey any manufacturers?</p> <p>11 A. No.</p> <p>12 Q. Did you shop to determine what people were doing in stores?</p> <p>13 A. I wasn't able to do that because the Obama shirt -- merchandise was long gone.</p> <p>14 Q. So you weren't able to shop retail stores to see what merchandise is selling best?</p> <p>15 A. As it relates to this product, a lot of this stuff I couldn't do because merchandise was no longer in the store, hadn't been in the store for over a year and a half.</p> <p>16 Q. Was there anything that you think you should have done that you weren't able to do for those reasons?</p> <p>17 A. With the merchandise not being there?</p> <p>18 Q. Yes.</p>	<p>1 gave you?</p> <p>2 A. Yes.</p> <p>3 Q. Do you see the paragraph that says "sales records"?</p> <p>4 A. Yes.</p> <p>5 Q. You referred to sales records just a couple of minutes ago; right?</p> <p>6 A. Um-hmm.</p> <p>7 Q. Do you see the first sentence says, "Every manufacturer and retailer searches its -- researches its own sales records"?</p> <p>8 Do you see that?</p> <p>9 A. I see that.</p> <p>10 Q. Is that a true statement?</p> <p>11 A. Yes.</p> <p>12 MS. FUGATE: Objection. Lack of foundation.</p> <p>13 BY MR. WILLIAMS:</p> <p>14 Q. Did you ask OBEY Clothing for any research it conducted on its sales records?</p> <p>15 A. I didn't ask for any research on their sales records. But I did ask and received after I wrote -- I think it was after I wrote the report, I received copies of their sales, you know, on a style basis.</p> <p>16 Q. You didn't receive that before you drafted your report; correct?</p> <p>17 A. No.</p> <p>18 Q. You would have done the same thing even if the merchandise were there?</p> <p>19 MS. FUGATE: Objection. Incomplete hypothetical.</p> <p>20 THE WITNESS: If it was current merchandise?</p> <p>21 BY MR. WILLIAMS:</p> <p>22 Q. Yes.</p> <p>23 A. There would be information available.</p> <p>24 Q. But I'm -- do you agree that you should have gone to the stores to see whether or not the merchandise was selling?</p> <p>25 MS. FUGATE: Objection. Incomplete hypothetical. Vague.</p> <p>26 THE WITNESS: The answer is no, I shouldn't have, because I knew darn well it stopped selling as of August '09 and there wasn't a drop of merchandise around.</p> <p>27 BY MR. WILLIAMS:</p> <p>28 Q. In your view there was nothing you could have done about that?</p> <p>29 A. That's correct. None of the above. Like consumer research, consumer sales records, trend analysis, none of that could have been done.</p> <p>30 Q. Do you see page 92 of the Frings excerpt that I</p>
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	<p>1 A. I don't remember, to tell you the truth. I don't remember. I do know that I've read it, but I don't remember whether I read it in one of the depositions before I wrote the opinion or whether I had it afterwards. But I know that I've seen them.</p> <p>2 Q. Either way, you didn't include it in your opinions in this case; correct?</p> <p>3 A. I didn't include them -- no, I didn't, that's correct.</p> <p>4 Q. Was there a good reason for not including it in your opinions in this case?</p> <p>5 A. I don't remember whether I saw it before I read -- I wrote the paper. And if I did see it before I wrote the paper, I wasn't aware of a good reason to include it, the sale -- the total sales for style of the Obama merchandise -- you know, the OBEY Obama merchandise. It's pages and pages of style numbers and unit sales.</p> <p>6 If I did see it, I don't remember feeling that there was a reason for me to include that in my opinion.</p> <p>7 Q. Would you agree with me that the sales information would have been useful to have in determining consumer preferences for the Obama merchandise?</p> <p>8 A. It would have validated -- the total sales</p>

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<p>1 Q. Any scholarly literature that goes over that 2 methodology?</p> <p>3 A. No. But there's lots of people, like myself, 4 who have been in the industry for more years than they 5 care to admit -- in my case it's well over 45 because I 6 started in '59 -- and who use -- you know, who operate 7 the way I do when it's this kind of a current item.</p> <p>8 There were many times that we put into the line 9 something like that real fast. You couldn't use trend 10 analysis. You went by the gut. You just felt this was 11 something we got to go with.</p> <p>12 And Obama was something they had to go with and 13 they went with it. And the consumers just ate it up. 14 They just went with it.</p> <p>15 Q. Who were some of the other people who you 16 consider qualified to make this sort of gut analyses 17 that you're describing?</p> <p>18 A. There are -- you know, I can't mention names, 19 but there are -- there are a few people in the industry 20 that have been around as long as I have who will do the 21 same thing, who will, you know, give the same kind of a 22 description as to the approach to looking at something 23 like this for merchandise that doesn't exist anymore; 24 for a political theme that's nonexistent anymore. And 25 they'll tell you the same thing, okay.</p>	<p>1 There's nothing scientific in its approach. It now 2 finally is using technology, but it was the last 3 industry to use, you know, real computer technology.</p> <p>4 And coming from that background, and using that 5 nonsophisticated, nontextbook, so to speak approach, 6 what you got from me is the way it's been working for 7 years, which is exactly my methodology that I 8 described -- which I have now repeated many, many 9 times -- as opposed to following a -- a set of -- of 10 kind of rules or a set of perspectives that you fill in, 11 you know, and check off.</p> <p>12 It's now being developed on a more scientific 13 basis, but it hasn't been fully developed and it isn't 14 here yet.</p> <p>15 Q. And there are a few practitioners who still -- 16 who are still capable of giving your sort of analysis; 17 correct?</p> <p>18 A. Yes.</p> <p>19 Q. But you'd agree with me it's not a scientific 20 analysis.</p> <p>21 A. Exactly. That's what I just said. It's not 22 scientific.</p> <p>23 Q. And it's not a -- I think you used the term 24 "perspective" that you go in check off methodology; 25 correct?</p>
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<p>1 I'm sure that, you know, when I get asked about    2 my Lexus, and will you fill in this and that and the    3 other, that those are -- they have all kinds of, you    4 know, scientific methodologies. I have not heard of    5 that wor- -- those words. And I'm not aware of the    6 garment industry yet having the -- the kind of surveys    7 that, let's say, the -- the Lexus people do or    8 the Time Warner people do or -- you know, I'm not aware    9 of it yet.</p> <p>10 They -- they will be here, but they're not here    11 that I'm aware of yet.</p> <p>12 Q. In your view, are consumer preferences    13 different as measured in the garment industry as opposed    14 to other industries?</p> <p>15 A. Yes. Because a lot of the garment industry,    16 it's very seasonal, it's very instinct -- what do you    17 call that, when you -- you buy, but it -- it's not a    18 methodical. You know, when I go buy a car, I'm going    19 out to buy a car. You very often will end up buying a    20 new dress. You really didn't need it, but it was such a    21 bargain, you bought it kind of scenario. So there's a    22 lot of emotions involved.</p> <p>23 There's a lot of, you know, price differences    24 when it's on sale. Why do you think everything is on    25 sale right now? They're trying to increase their sales,</p>	<p>1 MS. FUGATE: Objection. Calls for a legal    2 conclusion. Incomplete hypothetical. Also a little    3 vague.</p> <p>4 You may answer it.</p> <p>5 THE WITNESS: It's very vague because it -- it    6 assumes a lot of ifs. Ifs. You know, if I    7 misunderstood, or if -- if I this, and if I that.</p> <p>8 If I misunderstood something and I base    9 something on something that I misunderstood, then maybe    10 the result is not correct.</p> <p>11 But I'm -- I'm telling you I didn't    12 misunderstand.</p> <p>13 BY MR. WILLIAMS:</p> <p>14 Q. Do you have any empirical data that you    15 included in your report that supports your conclusions?</p> <p>16 A. I do not.</p> <p>17 Q. You have no survey results; correct?</p> <p>18 A. That's correct.</p> <p>19 Q. No other work product?</p> <p>20 A. Work product.</p> <p>21 Q. Yes. Product of -- of analyses that you    22 performed.</p> <p>23 A. No.</p> <p>24 Q. That is, nothing that's written on paper except    25 for your report; correct?</p>
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<p>1 A. Uh-huh.</p> <p>2 Q. How many times in your experience in the</p> <p>3 fashion industry have you seen a political phenomenon</p> <p>4 like President Obama?</p> <p>5 A. Nobody's ever seen anything like Mr. Obama. We</p> <p>6 know --</p> <p>7 Q. Will you agree with me it's sui generis?</p> <p>8 A. I beg your pardon?</p> <p>9 Q. You'd agree with me it's a one-of-a-kind type</p> <p>10 of thing?</p> <p>11 A. Yeah. Mr. Obama is one of a kind.</p> <p>12 Q. If this is a one-of-a-kind event, then why do</p> <p>13 you rely on your experience in determining what consumer</p> <p>14 preferences --</p> <p>15 A. Because I rely on the motives of what makes</p> <p>16 consumers buy. They felt good when they bought that.</p> <p>17 They got emotional satisfaction. They felt they were in</p> <p>18 fashion. They felt they were coming up with what their</p> <p>19 peers were coming up with.</p> <p>20 I had to go and resort to those standard units</p> <p>21 that we accept as motives.</p> <p>22 MS. FUGATE: Ms. Goldaper, I want you to make</p> <p>23 sure that you let counsel finish the question.</p> <p>24 BY MR. WILLIAMS:</p> <p>25 Q. Let me turn your attention to paragraph 25.6 of</p>	<p>249</p> <p>1 A. I then went on to say that there were some</p> <p>2 who -- who bought it because they liked</p> <p>3 Shepard Fairey's --</p> <p>4 Q. I'm not asking about that yet, Ms. Goldaper.</p> <p>5 You said that all consumers who purchased Obama</p> <p>6 merchandise. That's what you're referring to in this</p> <p>7 statement; correct?</p> <p>8 A. Yes.</p> <p>9 Q. So that is, even if one of them disagreed with</p> <p>10 you, you're wrong; correct?</p> <p>11 A. Yes.</p> <p>12 Q. I mean, you used a hundred percent. Correct?</p> <p>13 A. I took the position that it didn't matter what</p> <p>14 the photograph was that was used to get the Obama image</p> <p>15 on -- on -- on the OBEY T-shirt; in this particular</p> <p>16 case, this merchandise.</p> <p>17 Q. Actually, you took the position that all of the</p> <p>18 people who purchased the merchandise, for them it did</p> <p>19 not matter what photograph the Obama image came from.</p> <p>20 Correct?</p> <p>21 A. What -- that's correct.</p> <p>22 Q. And my -- my question is how you were able to</p> <p>23 determine the motivations of 100 percent of the</p> <p>24 consumers who purchased the Obama merchandise.</p> <p>25 A. You got me. I have no scientific evidence.</p>
<p>1 your report again.</p> <p>2 In this paragraph, in the first sentence, you</p> <p>3 say:</p> <p>4 "In my opinion for all of the people who</p> <p>5 purchased Obama merchandise, it did not matter what</p> <p>6 photograph the Obama image came from."</p> <p>7 Correct?</p> <p>8 A. I said that, yes.</p> <p>9 Q. How is it that your fashion expertise could</p> <p>10 lead you to the conclusion about what consumers' cares</p> <p>11 about a particular photograph would be?</p> <p>12 A. Because I took the position that what made them</p> <p>13 buy it was Mr. Obama, not a photograph -- or whose</p> <p>14 photograph, but Mr. Obama is the -- this image that was</p> <p>15 on that merchandise is what motivated them to buy it.</p> <p>16 Q. I understand that you took that position. But</p> <p>17 my question is: Why did you take that position?</p> <p>18 MS. FUGATE: Asked and answered.</p> <p>19 THE WITNESS: Again, I already said that many</p> <p>20 times. I'm not going to say it again because I already</p> <p>21 answered this particular sentence three or four times.</p> <p>22 Q. You've already told me why you took the</p> <p>23 position that all consumers who purchased Obama</p> <p>24 merchandise did not care what photograph the Obama image</p> <p>25 came from?</p>	<p>250</p> <p>1 Q. If you have no scientific evidence, why did you</p> <p>2 include that statement in your report?</p> <p>3 A. Because I felt very strongly, and I still do as</p> <p>4 I'm sitting here, that what motivated the consumer to</p> <p>5 buy this particular merchandise was the fact that Obama</p> <p>6 was on that merchandise and not -- and it didn't matter</p> <p>7 to the consumer who bought it because Obama was on</p> <p>8 there, what photograph was used, to get that Obama</p> <p>9 picture on that merchandise. That was not a concern.</p> <p>10 That was the position I took.</p> <p>11 Q. Would you agree with me that you might have</p> <p>12 overstated your point a little bit in that sentence?</p> <p>13 A. If you want to take that position, it's okay.</p> <p>14 I'm --</p> <p>15 Q. I'm asking you whether you agree or disagree</p> <p>16 with me. Did you -- do you think that you overstated</p> <p>17 your position a little bit there?</p> <p>18 A. Maybe not a hundred percent of the people, but</p> <p>19 I don't think it mattered to anybody what photograph was</p> <p>20 used. I don't think they thought about it, to tell you</p> <p>21 the truth. As an average consumer, when you buy</p> <p>22 something that had, you know, Obama on the T-sh- -- on</p> <p>23 the shirt, you bought it because of Obama, not because</p> <p>24 of the photograph that was used as a reference for it.</p> <p>25 That was my opinion. You bought it because of</p>

<p style="text-align: right;">253</p> <p>1 Obama, not because of the photograph that was used as a 2 source or the reference for it, especially since the 3 photograph and some of the elements of the photograph 4 had been rearranged.</p> <p>5 Q. But you can't point to any evidence in support 6 of your opinion on that point; correct?</p> <p>7 A. Well, that's true, I'm not giving medical 8 evidence about the results of a certain drug. I have 9 no med- -- I have no numerical evidence, that's correct.</p> <p>10 Q. Do you have any empirical data?</p> <p>11 A. I don't know how you define empirical data. I 12 have no data with numbers on it to support that.</p> <p>13 Q. You were talking about the changes that 14 Mr. Fairey made to the photograph; correct?</p> <p>15 A. Yes, I made reference to that.</p> <p>16 Q. Before I go to that, because you have no 17 numbers, do you have any way of determining if it was 18 short of 100, how many consumers didn't care what 19 photograph the source image came from?</p> <p>20 A. I have no scientific way of determining it.</p> <p>21 Q. Do you have any way of determining it, 22 scientific or not?</p> <p>23 A. No. I don't think it matters. But if you need 24 to have it determined in a scientific way, I don't have 25 it.</p>	<p style="text-align: right;">255</p> <p>1 correct -- 2 A. Goldaper -- 3 Q. -- oh, I'm sorry -- Goldaper 2, which is the 4 side-by-side of the Obama photo with the Obama image. 5 Yes. Could you take that out. 6 If the consumers didn't care what photograph 7 were used in the Obama merchandise, do you know whether 8 Mr. Fairey cared -- 9 A. Of it -- 10 Q. -- if his photograph was used? 11 MR. SIMON: Objection. Lacks foundation. 12 MS. FUGATE: Also calls for speculation. 13 MR. WILLIAMS: I just said do you know. 14 Q. But go ahead. You can answer. 15 A. I don't know. 16 Q. Did you review Mr. Fairey's deposition 17 transcript in this case? 18 A. I did. 19 Q. Do you know whether Mr. Fairey provided any 20 testimony about whether or not he specifically chose the 21 Obama photograph to use as a reference for the Obama 22 image? 23 A. I know that in the end, he selected this 24 photograph, based on what I've read in his depositions. 25 I don't know the process he used to get to that.</p>
<p style="text-align: right;">254</p> <p>1 Q. Similarly, do you have any methodological way 2 of determining what percentage of the value of the Obama 3 merchandise should be attributed, if not zero, to the 4 protected elements of the Obama photo?</p> <p>5 A. I still give it zero value. I still say this 6 was an impulse. And when you buy something on an 7 impulse, myself included, we don't figure out, you know, 8 where it came from or what photograph was used. 9 When I see something in the store, as most 10 consumers do, and it's an impulse purchase, which is a 11 lot of us buy on impulse, we don't go through the 12 rationale of, hmm, what photograph could possibly have 13 been used to create this picture or this -- but I love 14 what's on it; I'm buying it. 15 And that's how I went. I don't have numbers 16 and I don't have any empirical data.</p> <p>17 Q. Do you have any quantifiable evidence?</p> <p>18 A. It's the same thing. I just said I don't have 19 any numerical; I don't have any empirical data; I don't 20 have anything quantifiable except the fact that working 21 with the consumer long enough, I know -- even if this 22 wasn't an impulse, I know that the consumer at that 23 point because they love what's on the T-shirt will buy 24 it.</p> <p>25 Q. You have the Goldaper 3 in front of you;</p>	<p style="text-align: right;">256</p> <p>1 Q. Do you know that Mr. Fairey reviewed around 200 2 images of Barack Obama before he chose the Garcia photo? 3 MR. SIMON: Objection. Lacks foundation. 4 MR. WILLIAMS: I'm asking her if she knows. 5 Q. Do you know that? 6 A. I read that in his deposition. 7 Q. Do you have any reason to doubt it? 8 A. No. 9 Q. Do you know that Mr. Fairey stated in an NPR 10 interview that there were particular qualities about the 11 Garcia photo that prompted him to choose it as a 12 reference for the Obama image? 13 MR. SIMON: Objection. Mischaracterizes the 14 record. 15 THE WITNESS: You know, I didn't -- I -- I know 16 that there was reference to this NPR interview, but I 17 didn't read the interview. But I -- I know there was a 18 reference to it. 19 BY MR. WILLIAMS: 20 Q. Did you read the deposition -- the parts of his 21 deposition transcript that referred to what he said in 22 the interview? 23 A. I'm trying to bring it back. 24 Q. Would it help if I quoted for you? 25 A. No. I -- I -- I think he -- he -- he referred</p>

<p>261     1 protectable element from the left-hand part of Goldaper 2 2, the Obama photo, that contributed to the value; 3 correct? 4     A. Yes. 5     Q. So on the right-hand side 100 percent of the 6 value, on the left-hand side zero percent; correct? 7     A. On this side, it's not a hundred percent 8 because it's still Obama right there. And AP doesn't 9 own that. And on this side, I said it's a hundred 10 percent no value to the protectable elements. Okay. 11     They both have Mr. Obama and -- and that's not 12 protected by anything. 13     So, you know, this is not a hundred percent 14 only in the protectable elements because a picture isn't 15 all only about the protectable elements. So they're 16 here, there is stuff that isn't protected, namely 17 Mr. Obama. And so there is here, too. 18     Q. Is the fact that Mr. Obama in both pictures? 19     A. Yeah. 20     Q. But you've already testified that the fact that 21 it is Mr. Obama isn't 100 percent responsible for the 22 value of the design of the OBEY merchandise, correct? 23     A. I said there were other factors in getting it 24 sold. You know, that they're minor factors, but that 25 they were there.</p>	<p>263     1 protected that are listed here, I could not find in any 2 of the reasons for the consumer buying those garments 3 that there was anything I could assign to these 4 protectable elements. 5     Q. So if I go through each of the protectable 6 elements that are listed in paragraph 19 of your expert 7 report, you're going to tell me that you simply could 8 not find any evidence that consumers valued that element 9 when they purchased the Obama merchandise? 10     A. I don't know. 11     Q. Let's go through it. We can -- I mean you 12 refer to the protectable elements. I suspect that in 13 listing these protectable elements, you understood what 14 they meant. So I'm going to go through them. And if 15 you can't give me an answer yes or no, then just tell me 16 that and that's fine, but I'm going to build my record 17 here, Ms. Goldaper. 18     A. I'm not sure I understand what you're trying to 19 build. I -- I told you I'm not an artist so I can't 20 distinguish, you know, whether this pose is exactly a 21 mirror image of that pose. 22     I know that Barry made changes. 23     Q. I'm not asking mirror images. I'm asking 24 whether there are protectable elements of the Obama 25 photo that contributed to what you consider the overall</p>
<p>262     1     Q. I'm not talking about getting it sold. I'm 2 talking about your opinions, Ms. Goldaper, which were 3 that there was zero percent contribution to, as you 4 said, the value of the design of the Obama merchandise; 5 correct? 6     MS. FUGATE: Objection. Vague. Also, I think 7 misstates testimony. 8     THE WITNESS: There was zero value in the 9 protectable elements of -- on -- of the image that was 10 on the Obama merchandise, that's what I said. 11 BY MR. WILLIAMS: 12     Q. Okay. I'd like you to keep that out, okay? 13 Because I'm going to ask you some questions about the 14 protectable elements. 15     Is the posing of president Obama in the Obama 16 photo at all attributable to the -- does it contribute 17 at all to the value of the design of the Obama 18 merchandise? 19     A. I'm not an artist and that's not my area of 20 expertise as to what specifically did or didn't. I can 21 only tell you that the fact that Mr. Obama's on this 22 picture and then on the garment of OBEY Clothing is what 23 got consumers to buy it. 24     But I can't rip it apart like you're asking me 25 to do. I can only tell you that the elements that are</p>	<p>264     1 theme or focus of the Obama image for purposes of 2 contributing to the value of the Obama merchandise. 3     Okay? 4     MS. FUGATE: I'll object to all this line of 5 questioning as an incomplete hypothetical. 6     THE WITNESS: Plus I've already testified that 7 I gave it zero value. So how much more can I do? 8 BY MR. WILLIAMS: 9     Q. Well, you can explain your -- your testimony, 10 and that's what I'm going to ask you to do right now. 11     Is it your testimony that the posing in the 12 Obama photo on your left contributed zero value to the 13 design of the Obama merchandise? 14     A. I'm going to go on record one more time. 15     All of the protectable elements, whether 16 stand-alone or together, gave zero value to the reasons 17 why consumers bought the Obama merchandise from OBEY. 18     Now, if you want to take each one, I'll just 19 say no, no, no, no, no. 20     Q. Are there, in your view, sufficient differences 21 between the posing in the Obama photograph and the 22 posing in the Obama image? 23     A. I told you I'm not an artist. 24     Q. I understand. But you -- you -- you are 25 testifying about your impressions of the focal point of</p>

<p>265</p> <p>1 the design; correct?</p> <p>2 A. He changed it enough. He changed it. The</p> <p>3 posing and the -- you know, the -- his ear, his chin and</p> <p>4 he moved the -- it a little bit.</p> <p>5 Q. I'm not asking about his -- his ear or his chin</p> <p>6 yet. I'm asking about the posing. You're saying that</p> <p>7 he changed the posing enough that it's a sufficient</p> <p>8 difference in your view that the Obama image has a</p> <p>9 compelling point of focus that the Obama photo lacks?</p> <p>10 A. I can't answer.</p> <p>11 Q. Do you notice that there's a three-quarter</p> <p>12 perspective in both of Obama photo and the Obama image?</p> <p>13 MS. FUGATE: Objection. Calls for a legal</p> <p>14 conclusion.</p> <p>15 THE WITNESS: Yeah, I wouldn't know what it</p> <p>16 is -- what it is that you're asking me.</p> <p>17 BY MR. WILLIAMS:</p> <p>18 Q. You don't know what a three-quarter perspective</p> <p>19 is?</p> <p>20 A. No. Apparently you're saying that his head is</p> <p>21 tilted three-quarters or at a 60-degree angle or</p> <p>22 something.</p> <p>23 Q. But you have no understanding of what a</p> <p>24 three-quarter --</p> <p>25 A. No.</p>	<p>267</p> <p>1 Clothing.</p> <p>2 And I -- I -- I can't answer anymore. I mean</p> <p>3 I -- you know, you've taken the words and turned them</p> <p>4 around. I don't know what you want.</p> <p>5 BY MR. WILLIAMS:</p> <p>6 Q. Let me ask you a simple question.</p> <p>7 A. Yeah. That's better.</p> <p>8 Q. You would agree there are differences between</p> <p>9 the Obama photo and the Obama image; correct?</p> <p>10 A. Yes.</p> <p>11 Q. Would you agree there are also similarities?</p> <p>12 A. Yes.</p> <p>13 Q. What are the similarities?</p> <p>14 A. It's Mr. Obama's face.</p> <p>15 Q. Any other similarities?</p> <p>16 A. It's a picture of Mr. Obama.</p> <p>17 Q. Apart from the fact that it's a picture of</p> <p>18 Mr. Obama, do you, as you sit here under oath, recognize</p> <p>19 any other similarities between the Obama photo and the</p> <p>20 Obama image?</p> <p>21 A. It's a picture of Mr. Obama and this one is in</p> <p>22 that brown sleepier (sic) kind of a color, this has got</p> <p>23 red in it, this has blue in it. His tie is red instead</p> <p>24 of blue. It's a blue suit instead of a black suit.</p> <p>25 It's basically Mr. Obama. And this one is colored</p>
<p>266</p> <p>1 Q. -- perspective is except for that assumption?</p> <p>2 A. No.</p> <p>3 Q. Is there a difference in the angle of</p> <p>4 President Obama's gaze between the Obama photo and the</p> <p>5 Obama image?</p> <p>6 MS. FUGATE: Objection. Calls for a legal</p> <p>7 conclusion. Lack of foundation.</p> <p>8 THE WITNESS: I'm not an artist. But I -- it</p> <p>9 looks to me like the gaze is a little bit different.</p> <p>10 BY MR. WILLIAMS:</p> <p>11 Q. Is the gaze sufficiently different that the</p> <p>12 Obama photo has zero contribution to the value of the</p> <p>13 Obama merchandise and yet the Obama image creates a</p> <p>14 focal point that contributes to the value?</p> <p>15 MS. FUGATE: Objection. Vague. Incomplete</p> <p>16 hypothetical.</p> <p>17 THE WITNESS: You know, I can't answer any of</p> <p>18 those questions anymore because you fried me with the</p> <p>19 image and the picture and I'm so darn confused about the</p> <p>20 difference between the picture and the image that I'm</p> <p>21 not sure I know -- I have any clue anymore what you're</p> <p>22 asking me.</p> <p>23 I don't -- I don't know how to answer you</p> <p>24 because this is -- this is the photo and this is what</p> <p>25 Shepard Fairey did, and this is what was on the OBEY</p>	<p>268</p> <p>1 differently and it's got some differences.</p> <p>2 Q. You're telling me there are some differences</p> <p>3 between the two -- the picture and the photograph;</p> <p>4 correct?</p> <p>5 A. There's some differences, yes. And one's a</p> <p>6 piece of art and one is a pic- -- is a photo.</p> <p>7 Q. Right. That was my last set of questions.</p> <p>8 Now, I'm asking you, as you sit here under oath, besides</p> <p>9 the fact that Mr. Obama is in both of them, what are the</p> <p>10 other similarities that you see?</p> <p>11 MS. FUGATE: Objection. Lack of foundation.</p> <p>12 THE WITNESS: I can't answer it anymore.</p> <p>13 They're both Mr. Obama. I mean similarity, his nose,</p> <p>14 his ears. I don't know where you're going.</p> <p>15 You know, there are similarities because it's</p> <p>16 the same person. It's just that the background's</p> <p>17 different, he's got color here and, you know, he's</p> <p>18 colored the -- the tie. There's -- there's some</p> <p>19 noticeable differences between the piece of art and the</p> <p>20 photo.</p> <p>21 BY MR. WILLIAMS:</p> <p>22 Q. I'm not asking about differences, Ms. Goldaper.</p> <p>23 I'm asking if you notice any similarities, for example,</p> <p>24 with respect to the facial expression that Mr. Obama</p> <p>25 has?</p>

<p>297</p> <p>1 Obama sales. It could be, but I don't remember exactly 2 when I got those. 3 Q. You offered the opinion that the revenues from 4 the Obama merchandise had a disruptive effect on 5 OBEY Clothing's revenues more generally; correct? 6 MS. FUGATE: Objection. Misstates the report. 7 THE WITNESS: Yeah, you'll have to go back to 8 where I state what I state. 9 BY MR. WILLIAMS: 10 Q. Well, why don't you just tell me? Is that a 11 true statement? Is that your opinion? 12 A. That the revenue from the Obama sales disrupted 13 the revenue to the overall? 14 Q. Yes. 15 A. I don't believe I said that. I would -- those 16 are not my words. 17 Q. Do you think that the efforts that OBEY 18 Clothing had to undertake in order to generate the Obama 19 merchandise revenue had a negative impact on 20 OBEY Clothing's revenues more generally? 21 A. What it had an impact on was on their costs 22 of -- maybe their overhead costs, what I call SG and A. 23 We don't know, and there is no way of determining it 24 that I'm aware of, whether the sales from the Obama 25 merchandise interfered in terms of the total sales for</p>	<p>299</p> <p>1 they could have gotten in regular sales, but we do know 2 that it interrupted the normal flow of their regular 3 merchandise. 4 Q. So it's your testimony that OBEY Clothing could 5 possibly have lost some sales because they moved the 6 production from other products into Obama merchandise; 7 correct? 8 A. That's correct. 9 Q. And it's also your testimony that any 10 disruption that occurred cannot be quantified in 11 dollars; correct? 12 A. That's right. You can -- can't put a total 13 dollar on it but you do know that it -- that -- that 14 it's happening and it is costing dollars. 15 Q. Since we're talking about the substance of your 16 opinion, I should probably ask you to make sure that we 17 stated it clearly. 18 So if you'll turn to paragraph 24 of your 19 report. 20 A. 24. I'm there. 24. Okay. 21 Q. Your second opinion is that, "The overhead 22 costs attributable to creating specialized merchandise 23 to be sold for philanthropic purposes as the Obama 24 merchandise was intended to be are generally greater 25 than those attributable to merchandise that is sold for</p>
<p>298</p> <p>1 Obama as a company. 2 In other words, we have no evidence that we 3 could use to address that. Okay. 4 Q. Let me just make sure that I understand because 5 I think you might have misstated a word, but I'm going 6 to break this down anyway. 7 It's your testimony that there is no way of 8 determining or no way that you're aware of determining 9 whether the sales from the Obama merchandise interfered 10 with the total sales of OBEY Clothing as a company; 11 correct? 12 A. With the total sales of OBEY company -- we have 13 no way. We do know that it disrupted and could possibly 14 have lost some sales because they moved the production 15 from the other product and they moved the production 16 into the Obama product. 17 We can't quantify it in dollars, but we can say 18 that it disrupted the process, the normal process 19 because they expedited the Obama program. And in terms 20 of -- in order for them to expedite it and make it 21 happen on time, it could have and most likely did 22 interrupt the normal flow of their regular price 23 merchandise and, therefore, their sales. 24 In that sense it disrupted it, but we can't 25 quantify the dollar amount because we don't know what</p>	<p>300</p> <p>1 profit." 2 Correct? 3 A. Yes. 4 Q. You also opine that "The sale of merchandise 5 where profits are donated to charity, costs the 6 manufacturer to lose time, energy and cash since that 7 time, energy and cash could have been used instead to 8 manufacture for-profit merchandise"; correct? 9 A. That's just what I said. Right. 10 Q. I'm just reading your -- 11 A. Right. 12 Q. -- paragraph. 13 A. I just didn't put a dollar amount on it. Okay. 14 But yes, that's -- 15 Q. Now, what qualifies you to provide the opinion 16 that the overhead costs attributable to creating 17 specialized merchandise to be sold for philanthropic 18 purposes is generally greater than those attributable to 19 merchandise that is sold for profit? 20 A. Okay. If you recall his regular merchandise, 21 he uses a catalog, okay, and he puts sample up and he 22 has his catalog and buyers can order from the catalog. 23 And if you recall from all of his testimony, 24 the Obama merchandise was not in his catalog. 25 Q. I'm asking a different question, Ms. Goldaper.</p>

<p style="text-align: right;">309</p> <p>1 Q. Did you actually see that there were extra 2 costs when you were preparing your expert report in this 3 case?</p> <p>4 A. I did not see the financials at that point, but 5 I do know that extra sampling, extra customer service, 6 extra -- you know, when it's not in a catalog and it's 7 not on the regular run it's going to cost extra money to 8 make it happen.</p> <p>9 I know that.</p> <p>10 Q. Did you know that for a fact with respect to 11 any of the activities that were conducted by OBEY 12 Clothing in this case at the time that you wrote your 13 expert report?</p> <p>14 A. I do know at the time I wrote the expert report 15 that I had read in Juncal's deposition that he -- and he 16 listed extra costs, like the extra commission and the 17 extra marketing costs and the extra sampling costs, he 18 said I can give you a laundry list of the extra costs, I 19 think that was a reference in my paper somewhere because 20 I remember reading that.</p> <p>21 Q. Having read Mr. Juncal's testimony, were you 22 curious to see how much in extra costs there were?</p> <p>23 A. You know, this was a time element and I needed 24 to read as much as I could and -- and I just prioritized 25 what I was reading so that I could get this written.</p>	<p style="text-align: right;">311</p> <p>1 increased?</p> <p>2 A. I know for a fact that if you have to do extra 3 sampling -- I don't need to see a financial statement, 4 that's going to cost extra money.</p> <p>5 I also know that it's going to cost extra 6 design efforts. I don't need to see a financial 7 statement or talk to the accountants.</p> <p>8 Now, I told you I didn't quantify it in 9 dollars, but I know that there's extra costs.</p> <p>10 Q. So -- just so that we're clear, the basis for 11 your second opinion is, first, that Mr. Juncal testified 12 that he had extra costs; second, that you based on your 13 experience with Stop Staring, Prisma and some other 14 consulting clients have experienced extra costs in 15 philanthropic merchandising and so you provided the 16 opinion that generally there are extra costs with 17 philanthropic merchandising; correct?</p> <p>18 A. Yes. I do believe Chris, whose deposition I 19 also read, I believe he makes reference to it as well.</p> <p>20 Q. Is that in your expert report?</p> <p>21 A. I didn't quote Chris. Or maybe -- I don't 22 think I quoted him because it was a repetition of what 23 Juncal said, that there are extra costs, and he probably 24 was referring to the extra marketing or extra sales 25 costs. But Juncal I felt said it well enough in</p>
<p style="text-align: right;">310</p> <p>1 I also had to write it within a time frame that 2 was extremely tight. And so although I may have been 3 curious, I didn't pursue it.</p> <p>4 Q. So you relied entirely on Mr. Juncal's 5 deposition testimony; correct?</p> <p>6 A. And my own background. In other words, when 7 Mr. Juncal, for example, said that I can give you a 8 long -- a laundry list of what we incurred in this 9 project, I knew exactly what he was referring to because 10 I've been down that road, either in my own business with 11 Stop Staring or with some of the clients who have said, 12 hey, we've got to do something to make a donation. So 13 we're going to give clothes and here's what we want to 14 do it.</p> <p>15 Q. Was information available to you that would 16 have allowed you to confirm or disprove that the costs 17 were higher with respect to the Obama merchandise?</p> <p>18 A. You -- you mean to quantify the dollars?</p> <p>19 Q. Just -- not even to quantify the dollars, but 20 just to look at the figures to see if it was correct?</p> <p>21 A. Well, looking at the figures means to quantify 22 the dollars.</p> <p>23 Q. No, I'm not asking you to tell me how much the 24 costs increased. I'm asking whether you wanted to look 25 at the costs to see if whether, in fact, they had</p>	<p style="text-align: right;">312</p> <p>1 No. 26.3 that I -- and he included it -- it's just you 2 have people spending time on production and design and 3 marketing, so I just took his quote, because it was, you 4 know, as opposed to working on other projects within the 5 company.</p> <p>6 So yes, to answer your question yes, it's based 7 on what I read in the depositions and it's based on my 8 own experience in working with that type of product.</p> <p>9 Q. So to be clear, you read the deposition. It 10 rang true to you based on things that you've done --</p> <p>11 A. Yes.</p> <p>12 Q. -- and so you testified that it's a general 13 principle; correct?</p> <p>14 A. Yes.</p> <p>15 Q. Is there anything externally beside your own 16 experience or Mr. Juncal's deposition testimony that you 17 could point to to show that as a general principle 18 philanthropic merchandising generally requires higher 19 overhead than other types of merchandising?</p> <p>20 A. There is nothing in a textbook or anything 21 exterior that I've ever read that would clearly state 22 just exactly that. I've not seen it, you know, in 23 anything outside of this. And that's because usually it 24 happens -- it's not a standard procedure to donate 25 clothing, it's an option that apparel companies decide</p>

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<p>1 to do.</p> <p>2 Q. Well, now, didn't you say that donating</p> <p>3 clothing is widespread in the apparel and fashion</p> <p>4 industry?</p> <p>5 A. It is a way for the apparel industry to donate.</p> <p>6 It is a common way for the apparel industry to make</p> <p>7 donations. Instead of a lot of money, they give a lot</p> <p>8 of clothing, it is not uncommon. Yes, I did say that.</p> <p>9 But what I'm saying now is there's nothing in</p> <p>10 the textbook and there's nothing outside of my 45-years</p> <p>11 experience in working with clients and hands-on</p> <p>12 experience doing production, working with samples,</p> <p>13 working with product development that, in addition, I</p> <p>14 can't find anything in writing that would support that,</p> <p>15 other than my own experience with these people and these</p> <p>16 companies.</p> <p>17 Q. Have you ever heard anybody besides Mr. Juncal</p> <p>18 have this sort of -- beside Mr. Juncal and yourself --</p> <p>19 make the observation that the overhead costs associated</p> <p>20 with charitable or philanthropic merchandising are</p> <p>21 higher?</p> <p>22 A. Other than the principals, because I said Chris</p> <p>23 did say it, too, and I'm pretty sure, Chris Broders, or</p> <p>24 whatever his name is, I think he made reference. I</p> <p>25 didn't put that in the opinion. I said only Juncal did.</p>	<p>1 Q. And that's all you're relying on is your</p> <p>2 personal experience and Mr. Juncal's deposition?</p> <p>3 A. Right.</p> <p>4 Q. Mr. Broder's deposition testimony, whatever it</p> <p>5 was and for whatever reason, didn't make it into your</p> <p>6 expert report; correct?</p> <p>7 A. That's correct.</p> <p>8 Q. Not part of your opinions in this case?</p> <p>9 A. That's correct. I didn't need to be</p> <p>10 repetitious. I mean that's correct.</p> <p>11 Q. Do you know whether OBEY Clothing in fact</p> <p>12 incurred greater sampling costs in association with</p> <p>13 their Obama merchandising?</p> <p>14 A. Are you asking me if I know -- I have no idea</p> <p>15 what the dollars were. But I do know that it had to</p> <p>16 have cost them extra. I don't know how many dollars.</p> <p>17 Q. You are assuming that it would have cost them</p> <p>18 extra; correct?</p> <p>19 A. It's a special project. It's a special line.</p> <p>20 That wasn't part of their regular line. It was not part</p> <p>21 of their seasonal product. It was not part of their</p> <p>22 catalog, so it had not been developed in the normal way</p> <p>23 that they develop a line.</p> <p>24 Now, all of a sudden, here comes and they say,</p> <p>25 okay, let's put this in. Well, it's not in the catalog,</p>	
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	<p>1 I have not seen any statements to that effect outside of</p> <p>2 OBEY and my own statements.</p> <p>3 Q. It's OBEY and your own statements are all that</p> <p>4 you've heard to that effect; is that correct?</p> <p>5 A. Yes.</p> <p>6 Q. Why did you say generally rather than just</p> <p>7 saying that the overhead costs attributable to creating</p> <p>8 specialized -- specialized merchandise to be sold for</p> <p>9 philanthropic purposes is greater than that attributable</p> <p>10 to merchandise that is sold for profit?</p> <p>11 A. Because I didn't have specific numbers. And if</p> <p>12 I had specifics, I would have said specifically. And I</p> <p>13 said generally, because like many of the actions in the</p> <p>14 garment industry, we still don't have uniform -- we</p> <p>15 don't have -- we don't even have uniform fit</p> <p>16 requirements; in other words, a size 6 in my company is</p> <p>17 totally different than a size 6 in her company. We have</p> <p>18 no uniformity of -- of standards of much of what we do.</p> <p>19 We're getting there, but we don't have it yet.</p> <p>20 We have no uniformity in how people establish</p> <p>21 what they're going to donate and how they're going to</p> <p>22 donate or what it has cost them. Therefore, I have to</p> <p>23 rely on my own personal experience, having done it</p> <p>24 through the years, and what Mr. Juncal said in his</p> <p>25 deposition.</p>	<p>1 we don't have specs, we don't have anything. So they</p> <p>2 got to go and do all of this.</p> <p>3 It's got to cost extra money, it's got to cost</p> <p>4 extra hours.</p> <p>5 Q. What I'm asking you is based on Mr. Juncal's</p> <p>6 deposition testimony, you're assuming that there were</p> <p>7 higher sampling costs than typical; correct?</p> <p>8 A. Yes.</p> <p>9 Q. The reason that there were higher costs in your</p> <p>10 view is because the merchandise wasn't part of the</p> <p>11 regular line; correct?</p> <p>12 A. There were additional costs. I think that's a</p> <p>13 better word.</p> <p>14 Q. That is there were additional costs because the</p> <p>15 merchandise was not a part of their regular line;</p> <p>16 correct?</p> <p>17 A. That's correct.</p> <p>18 Q. That would be true of merchandise that was not</p> <p>19 part of their regular line regardless for whether it was</p> <p>20 sold for philanthropic purposes; correct?</p> <p>21 A. Yes. But they wouldn't be doing it because</p> <p>22 it's not a good business decision unless it's some</p> <p>23 program like this. I mean I'm not aware of OBEY</p> <p>24 Clothing having done this in the past, where they go out</p> <p>25 of season; in other words, after they put their product</p>



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<p>1 MS. FUGATE: Objection. Vague. Calls for 2 speculation. Lack of foundation.</p> <p>3 THE WITNESS: In what I was told by Juncal and 4 what I was read -- what I read in his deposition, the 5 Obama program started as a not-for-profit program. So I 6 approached it as that.</p> <p>7 BY MR. WILLIAMS:</p> <p>8 Q. That is you assumed for purposes of your 9 analysis that the Obama merchandise was a not-for-profit 10 project; correct?</p> <p>11 A. The development or the extra costs came in -- 12 the answer is yes, I assumed, with good reason. Because 13 the extra costs don't come in once the product is 14 developed. The extra costs came in at the beginning 15 when it was a not-for-profit program.</p> <p>16 Q. Do you know on what day the Obama merchandise 17 ceased to be a not-for-profit project in your view?</p> <p>18 A. No, I don't.</p> <p>19 MS. FUGATE: Objection. Calls for speculation. 20 Lack of foundation.</p> <p>21 BY MR. WILLIAMS:</p> <p>22 Q. Do you know what stage -- I'm asking her do you 23 know -- do you know at what stage in the process the 24 Obama merchandise became, if it was ever, a for-profit 25 project?</p>	<p>1 however; correct?</p> <p>2 A. Yes.</p> <p>3 Q. To the extent that that assumption is flawed, 4 you'd agree with me that your conclusion is also flawed; 5 correct?</p> <p>6 MS. FUGATE: Objection. Argumentative.</p> <p>7 THE WITNESS: No, because I do tell you in my 8 opinion report that at -- at -- at one point in time -- 9 I don't tell you when -- they realized that it couldn't 10 continue to be a not-for-profit, meaning that they 11 realized they couldn't donate and, therefore, by 12 definition, if you can't donate anymore because of the 13 law limitations, legal limitations, it had to become a 14 for-profit venture. I don't know what the timing was.</p> <p>15 BY MR. WILLIAMS:</p> <p>16 Q. You do agree that the Obama merchandising was a 17 commercial venture; correct?</p> <p>18 MS. FUGATE: Objection. Calls for a legal 19 conclusion. Also vague.</p> <p>20 THE WITNESS: Only at one point. Not when it 21 started.</p> <p>22 BY MR. WILLIAMS:</p> <p>23 Q. But you don't know what activities -- you don't 24 know when it was started; correct?</p> <p>25 A. Yes. We know from the deposition that it was</p>
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<p>325</p> <p>1 correct?  2 A. That's correct.  3 Q. You have no idea; correct?  4 A. I do not know when he was informed that he  5 couldn't donate everything, that's correct.  6 Q. At the time that you submitted your expert  7 report, you had not reviewed the books and records of  8 OBEY Clothing; correct?  9 A. When you say the books and the records, are you  10 referring to what I've been calling, you know, those  11 income statements from the financials from Adam's  12 deposition? Is that what you're referring to?  13 Q. I'm referring to financials.  14 A. You know, I never really studied the  15 financials. I was interested and did read the sales  16 figures, the cost of goods, et cetera, et cetera. The  17 line items, some of them I read after I wrote the paper.  18 Q. My question was before you submitted your  19 expert report, you had not reviewed the financials of  20 OBEY Clothing when you were providing an opinion on  21 whether or not they would face increased costs of  22 overhead as a result of philanthropic merchandising;  23 correct?  24 A. I just answered that.  25 I said to you I haven't read -- I didn't read</p>	<p>327</p> <p>1 A. The --  2 MS. FUGATE: Objection.  3 THE WITNESS: The financials?  4 BY MR. WILLIAMS:  5 Q. Yes.  6 A. They're not part of the opinion report, no.  7 Q. They were available to you; correct?  8 A. After I submitted the report. I didn't have an  9 opportunity to read Adam's doc exhibits until after I  10 read the report.  11 Q. OBEY Clothing had financials; correct?  12 A. Yes.  13 Q. You know that they produced financials in this  14 case?  15 A. Yes.  16 Q. Could you have requested the financials from  17 OBEY Clothing?  18 A. I could have, yes.  19 Q. But you didn't?  20 A. That's correct.  21 Q. Would it have been relevant to your opinion  22 that their overhead costs had increased?  23 A. The accountants are the ones that put the  24 numbers on it and I already told you since I did know  25 that sales went up extremely -- you know, they went up</p>
<p>326</p> <p>1 the financials until after I wrote the paper.  2 Q. My question was, before you read -- before you  3 wrote your report, you hadn't reviewed the financials;  4 correct?  5 MS. FUGATE: Asked and answered.  6 THE WITNESS: I answered it twice now.  7 BY MR. WILLIAMS:  8 Q. And the answer is no, correct?  9 MS. FUGATE: Asked and answered.  10 THE WITNESS: I gave you the answer.  11 BY MR. WILLIAMS:  12 Q. Well, why don't you give it to me again if you  13 know what it is.  14 A. I told you that I read the financials or the  15 sales, you know, in the over -- the picture of an income  16 statement when I read Adam's deposition, which was after  17 I read the report.  18 Q. So you read those after you -- after you put  19 forward your opinions in this case; correct?  20 A. That's correct.  21 Q. Did not include them in your expert report;  22 correct?  23 A. I did not.  24 Q. They're not part of your opinions in this case;  25 correct?</p>	<p>328</p> <p>1 like \$9 million between '07 and '08, so I knew that  2 percentage-wise I wasn't going to find an increase in  3 percentages or if I did, it would be minor.  4 But that the line items would go up. But I  5 didn't go through the financials, I already told you  6 that.  7 Q. You assumed that the line items would go up,  8 correct?  9 A. Yes.  10 Q. But you didn't check the financials to confirm  11 that; correct?  12 A. That's correct.  13 Q. Even though the information was available to  14 you; correct?  15 A. I don't know how they categorize some of those  16 line items. And so, you know, I'm used to looking at a  17 line called research and development, that's my  18 sampling. Okay. And I don't know how they categorized  19 and I -- the answer is no, I didn't look at their  20 financials.  21 Q. Did you ask anybody from OBEY Clothing how they  22 categorized their costs?  23 A. No, I didn't.  24 Q. Could you have asked somebody from OBEY  25 Clothing how they categorized their costs?</p>

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<p>1 A. I could have done a lot of things. I didn't 2 ask. 3 Q. Couldn't you have asked somebody from OBEY 4 Clothing how they categorized their costs? 5 A. Yes. 6 Q. Did you? 7 A. No. 8 Q. Why not? 9 A. Well, let's see. I'll repeat it again. I had 10 a terrible time element. I tried to read as much as I 11 could, which I did, and I had to decide what it was that 12 I was going to read and what it was that I was going to 13 ask for. And it was not one of the items that I asked 14 for. 15 Q. You included no empirical data relating to 16 OBEY Clothing's cost in your expert report; correct? 17 A. That's correct. 18 Q. You included no empirical data relating to the 19 fashion and apparel industry in your expert report; 20 correct? 21 A. That's correct. 22 Q. You referred to no market trends or industry 23 standards relating to opinion 2 of your expert report; 24 correct? 25 A. That's correct.</p>	<p>1 Q. And even with respect to OBEY Clothing, you 2 didn't even ask for their financials before you 3 submitted the report; correct? 4 A. That's correct. 5 Q. Do you understand now how much profit OBEY 6 Clothing generated as a result of the Obama 7 merchandising? 8 MS. FUGATE: Objection. Calls for an expert 9 opinion. 10 THE WITNESS: I did not do any analysis of 11 their profitability and, therefore, I am not aware of 12 the number involved in their profitability. 13 BY MR. WILLIAMS: 14 Q. Have you heard from any source any estimates as 15 to what OBEY Clothing's profits were for the years 2007, 16 2008 or 2009? 17 A. You mean overall profits? 18 Q. Yes. 19 A. Yes. From the income statements, if you look 20 at the bottom, you can see it. 21 Q. Have you heard from any source any estimates as 22 to the profits that were generated as a result of the 23 Obama merchandising for the years 2007, 2008 or 2009? 24 A. I don't know accurate numbers. 25 Q. I'm not asking about accurate numbers. I'm</p>	
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	<p>1 Q. You related -- you referred to no industry 2 information external to OBEY Clothing at all in your 3 expert report; correct? 4 MS. FUGATE: Objection. Vague. 5 THE WITNESS: Yeah, I don't know what it is 6 that he just asked for. 7 What is it external data on -- on OBEY? You 8 mean -- 9 BY MR. WILLIAMS: 10 Q. Let me take a step back and I'll put it this 11 way. 12 In your report on increased overhead costs in 13 the fashion industry, you didn't refer to any companies 14 in the fashion industry except for OBEY Clothing; 15 correct? 16 A. It's real hard to find this kind of 17 information. Even on the Internet, you're not going to 18 find this kind of information. There's very little 19 published on that kind of -- there aren't any standards. 20 Q. My question wasn't whether or not the 21 information is hard to find. My question was, you 22 didn't refer to any companies in the fashion industry 23 except for OBEY Clothing with respect to opinion 2 in 24 your report, correct? 25 A. Yes.</p>	<p>1 asking whether you have become aware at any time of any 2 estimates of the profits that OBEY Clothing generated? 3 A. It's possible, but I don't remember exactly 4 that I saw a number in the office of counsel on 5 Wednesday which discussed the potential profits that it 6 could have been an expert report, but I -- I don't 7 remember. I think it was an -- an accounting expert 8 report of some sort. That was the only figure that I -- 9 that my eyes saw on the profitability of the OBEY 10 program. I didn't read the report. 11 Q. As we sit here, do you have any basis for 12 disputing the statement that OBEY Clothing generated a 13 profit of \$1,132,965 on the Obama merchandising? 14 A. I can't just -- 15 MS. FUGATE: Objection. Misstates the facts in 16 evidence. Also calls for an expert opinion. 17 THE WITNESS: Yeah, there's nothing I could 18 comment on that because I'm not in the accounting area 19 and there's no way I would know anything at all about 20 that kind of profitability or any profitability. 21 It's not a number I've seen and it's not a 22 number that I'm familiar with and there's nothing I 23 could say about that. 24 BY MR. WILLIAMS: 25 Q. If OBEY Clothing generated a profit on the</p>

349	<p>1 their charitable expenses?</p> <p>2 A. No, I don't. And now that you mention it, when</p> <p>3 I see charity on expenses, it was not a publicly traded</p> <p>4 company.</p> <p>5 Q. Privately held.</p> <p>6 A. Yes.</p> <p>7 Q. So getting back to my question, do you have any</p> <p>8 understanding how under Generally Accepted Accounting</p> <p>9 Principles a company has to account for charitable</p> <p>10 expenses?</p> <p>11 A. No. The answer is no.</p> <p>12 Q. Do you have any understanding as to whether or</p> <p>13 not there are any accounting rules or regulations</p> <p>14 relating to an increase in the cost of goods sold</p> <p>15 relating to charitable contributions?</p> <p>16 A. No.</p> <p>17 Q. Would you agree with me that OBEY Clothing</p> <p>18 enjoyed an increase in revenue during the year -- the</p> <p>19 first year that it began the Obama merchandising?</p> <p>20 A. You're talking about the year 2008?</p> <p>21 Q. Yes.</p> <p>22 A. It had an increase in revenue of \$9 million</p> <p>23 over 207.</p> <p>24 Q. Was part of that increase in revenue</p> <p>25 attributable to the Obama merchandising?</p>	351
350	<p>1 A. I know now that they had 2.2 million in sales</p> <p>2 for Obama merchandising -- merchandise.</p> <p>3 Q. So that's yes, part of the increase in revenue</p> <p>4 was attributable to Obama merchandising; correct?</p> <p>5 A. Yes.</p> <p>6 Q. In fact, about 25 percent of the increase in</p> <p>7 revenue over the prior year was attributable to Obama</p> <p>8 merchandising, correct?</p> <p>9 A. I said 2.2 million. If that's 25 percent by</p> <p>10 your calculations, I'll go with you. I don't have a</p> <p>11 calculator.</p> <p>12 Q. The increase in revenues would have allowed</p> <p>13 OBEY Clothing to cover more of its fixed costs; correct?</p> <p>14 A. Yes. In terms of percentages, the -- the</p> <p>15 fixed -- the lines would go up on the line in terms of</p> <p>16 percentages, yes.</p> <p>17 Q. So it's possible that the Obama merchandising</p> <p>18 could have helped OBEY Clothing increase its</p> <p>19 profitability; correct?</p> <p>20 A. It's possible.</p> <p>21 Q. You have one way -- you have no way of knowing</p> <p>22 one way or the other as to whether or not it was, in</p> <p>23 fact, the case that Obama merchandising increased</p> <p>24 OBEY Clothing's profitability; correct?</p> <p>25 A. As I sit here today, I don't know by how much.</p>	352

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<p>1 associated with philanthropic merchandising is generally 2 higher?</p> <p>3 MS. FUGATE: Objection. Incomplete 4 hypothetical. Also calls for speculation.</p> <p>5 THE WITNESS: I -- I did read that lady's 6 report, and she talks about percentages of overhead 7 and -- and she claims there was no increase, therefore, 8 and -- and I don't disagree because the percentages 9 didn't go up because the sales went up so high in -- 10 especially in 208.</p> <p>11 And so if I had been asked to render an opinion 12 regarding overhead, I would have looked not at 13 percentages but I would have looked at the line items.</p> <p>14 BY MR. WILLIAMS:</p> <p>15 Q. Would you have had the requisite expertise to 16 offer an opinion on overhead being that you're not an 17 accountant and have no accounting expertise?</p> <p>18 A. I would not.</p> <p>19 Q. So you --</p> <p>20 A. Which is why I wasn't asked to do it.</p> <p>21 Q. Is your opinion, opinion No. 2, is based solely 22 on your personal experience with the fashion and apparel 23 industry; correct?</p> <p>24 A. I would say 45 years of dealing with this 25 industry, up and down, back and forth. It's kind of</p>	<p>1 even have standard sizing units. 2 How can we have anything that's standard? 3 Which is why unless you are an accountant, a forensic 4 accountant who is familiar with the apparel industry, 5 you can only use standards that are common out there 6 in -- in, you know, the big world. But they don't 7 always -- they don't generally apply to the apparel 8 industry.</p> <p>9 Q. You do realize that there are standards and 10 business norms and other industries relating to whether 11 or not philanthropic merchandising increases costs; 12 correct?</p> <p>13 A. I do.</p> <p>14 Q. But you don't think that they apply in the 15 fashion and apparel industry; correct?</p> <p>16 A. Since I haven't been looking at those standards 17 and I -- I know they exist, but I'm not familiar with 18 it, I can't answer your question either way.</p> <p>19 Q. Did you look into them in the course of 20 preparing your report?</p> <p>21 A. No.</p> <p>22 Q. Do you think it would have been relevant to 23 your report?</p> <p>24 A. Maybe. I don't know.</p> <p>25 Q. But you decided not to rely on any business</p>
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<p>361</p> <p>1 A. Yes.  2 Q. I have nothing further for you, Ms. Goldaper.  3 Thank you for your time.  4 A. You're welcome.  5 THE VIDEOGRAPHER: This concludes today's deposition.  6 Going off the record.  7 The time is 5:33 p.m.  8 MR. SIMON: I have no questions.  9 THE REPORTER: Ms. Fugate, are you getting a copy?  10 MS. FUGATE: Yes. Please.  11 THE REPORTER: Mr. Simon, are you getting a copy?  12 MR. SIMON: I believe so, yes.  13 THE REPORTER: Anybody getting a rough draft?  14 MR. WILLIAMS: I'd like a rough.  15 MR. SIMON: Yeah, if you could give me a rough draft.  16 MS. FUGATE: We're getting the final though on Monday. We don't need a rough.  17 MR. SIMON: We don't need a rough then.  18  19  20  21  22  23  24  25</p>	<p>363</p> <p>1  2  3 DEPOSITION ERRATA SHEET  4  5  6 Our Assignment No. 357409  7 Case Caption: Shepard Fairey vs. The Associated Press  8  9 DECLARATION UNDER PENALTY OF PERJURY  10 I declare under penalty of perjury  11 that I have read the entire transcript of  12 my Deposition taken in the above captioned matter  13 or the same has been read to me, and the same is true  14 and accurate, save and except for changes and/or  15 corrections, if any, as indicated by me on the  16 DEPOSITION ERRATA SHEET hereof, with the understanding  17 that I offer these changes as if still under oath.  18 Signed on the _____ day of _____, 20____,  19  20 _____  21 GABRIELE GOLDAPER  22  23  24  25</p>
<p>362</p> <p>1 REPORTER'S CERTIFICATION  2  3 I, MARCELIN F. NOBLE, a Certified Shorthand  4 Reporter in and for the State of California, do hereby  5 certify:  6  7 That the foregoing witness was by me duly sworn;  8 that the deposition was then taken before me at the time  9 and place herein set forth; that the testimony and  10 proceedings were reported stenographically by me and  11 later transcribed into typewriting under my direction;  12 that the foregoing is a true record of the testimony and  13 proceedings taken at that time.  14  15 IN WITNESS WHEREOF, I have subscribed my name this  16 21st day of November, 2010.  17  18  19  20 _____  21 MARCELIN F. NOBLE, CSR No. 3024  22  23  24  25</p>	<p>364</p> <p>1 DEPOSITION ERRATA SHEET  2 Page No. _____ Line No. _____ Change to: _____  3 _____  4 Reason for change: _____  5 Page No. _____ Line No. _____ Change to: _____  6 _____  7 Reason for change: _____  8 Page No. _____ Line No. _____ Change to: _____  9 _____  10 Reason for change: _____  11 Page No. _____ Line No. _____ Change to: _____  12 _____  13 Reason for change: _____  14 Page No. _____ Line No. _____ Change to: _____  15 _____  16 Reason for change: _____  17 Page No. _____ Line No. _____ Change to: _____  18 _____  19 Reason for change: _____  20 Page No. _____ Line No. _____ Change to: _____  21 _____  22 Reason for change: _____  23  24 SIGNATURE: _____ DATE _____  25 GABRIELE GOLDAPER</p>