

EXHIBIT A

TO THE AP'S MOTION IN LIMINE NO. 2 TO EXCLUDE EVIDENCE OF FAIR USE, PURPOSE, AND INTENT UNDER FRE 402, 403, AND THE “LAW OF THE CASE” DOCTRINE

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

SHEPARD FAIREY and OBEY GIANT ART, INC.,

Plaintiffs,

v.

THE ASSOCIATED PRESS,

Defendant and Counterclaim Plaintiff,

v.

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

Counterclaim Defendants.

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

EXPERT REPORT OF

MARK L. HAIR, CPA

(FED. R. CIV. P. 26(a)(2)(B))

Respectfully submitted this 2nd day of November 2010:



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from standard to actual cost was a decrease in the standard COGS related to the Obama Merchandise in 2008 and 2009. A summary of the adjusted actual Obama Merchandise COGS is shown below and detailed in **Exhibit 6**:

	<i>Actual Annual COGS by Obama Merchandise Description</i>		
	2008	2009	Total
Obama	\$ 711,208	\$ 157,665	\$ 868,872
Yes We Did	39,529	99,994	139,523
Yes We Did - One Color	13,774	20,479	34,252
Total	\$ 764,510	\$ 278,138	\$ 1,042,648

C. Direct Costs

33. I also quantified four specific costs that are directly attributable to the Obama Merchandise. These direct costs are summarized in the following table (as well as **Exhibit 7**), and discussed in detail below:

<i>Direct Costs for Obama Merchandise</i>	
Royalty Expense	\$ 95,422
Marketing Fee Expense	2,733
Commission Expense	144,715
Obama Special Project Costs	74,011
Total Direct Costs	\$ 316,880

modifications that should be made to the financial statements in order for them to be in conformity with generally accepted accounting principles. (OTT 028545-562)

- **Royalty Expense** – Effective June 28, 2006, One 3 Two entered into an Amended and Restated Trademark License Agreement with Obey Giant.³³ Under this agreement, One 3 Two has the exclusive right to manufacture, distribute and sell clothing which displays Mr. Fairey’s artwork.³⁴ As compensation, Obey Giant receives royalties ranging from 0.5% to 5.5% of net sales, based on the associated discount off the normal selling price.³⁵ I have applied this royalty structure to the sales of the Obama Merchandise, as reflected in **Exhibit 7-A**. The result of this analysis is a total royalty expense related to the Obama Merchandise of \$95,422.³⁶
- **Marketing Fee Expense** – Effective July 1, 2006, One 3 Two entered into an Amendment to the Amended and Restated Trademark License Agreement with Obey Giant. Under this agreement, One 3 Two agreed to pay Obey Giant a marketing fee equal to 0.25% of net sales that were subject to a full royalty (i.e., 5.50% royalty rate).³⁷ I have applied this marketing fee structure to the sales of the Obama Merchandise, as reflected in **Exhibit 7-A**. The result of this analysis is a total marketing fee expense related to the Obama Merchandise of \$2,733.³⁸
- **Commission Expense** – One 3 Two pays sales commissions to certain of its sales representatives based upon the amount of sales generated by that representative

33 OBCL 00217-254.

34 OBCL 00221-222.

35 OBCL 00225-226.

36 The amount I have calculated for the royalty expense is the same as the amount determined by One 3 Two (OTT 027506, Van Berckelaer Deposition, Vol. I, pp. 141), as well as the amount I understand was received by Mr.

Fairey. (FAIREY 125542) However, I understand that while royalties were paid on the Obama Merchandise, this was contrary to the intentions of Mr. Fairey. (Juncal Deposition, pp. 127-128)

37 FAIREY 61287.001.

38 The amount I have calculated for the marketing fee expense is the same as with the amount I understand was received by Mr. Fairey. (FAIREY 125542)

and the discount level applied to those sales.³⁹ As detailed in **Exhibit 7-B**, the amount paid for commissions related to the sale of Obama Merchandise totaled \$144,715.

- **Obama Special Projects** – In an effort to support then-Senator Barack Obama during his presidential campaign, One 3 Two engaged in a series of promotional activities.⁴⁰ These activities involved the donation of Obama Merchandise in the form of t-shirts and shirts, as well as profits from the sale of the Obama Merchandise, to various entities supporting the presidential campaign. Specifically, the profits were used to pay for magazine advertisements, posters, postcards, flyers and window graphics, all of which contained the Obama Image.⁴¹ The costs associated with the donated products totaled \$74,011, as reflected in **Exhibit 7-C**.

D. Indirect Costs

34. Overhead, often referred to as indirect costs, are costs that cannot be specifically allocated, or are difficult to trace, to a specific business activity, product line, or product. However, these costs are requisite for the production, distribution and sales of the products and necessary to the operations the business. Examples of indirect costs include expenses such as administrative payroll, utilities, rent, insurance, and depreciation, among others.

35. In many cases, it is not practical or possible to allocate indirect costs to specific manufactured units based on metrics, such as the relative amount of time spent on a

39 Van Berckelaer Deposition, Vol. I, pp. 183-184.

40 Juncal Deposition, Vol. I, pp. 176-177; and Deposition of Christopher Broders, March 16, 2010 (“Broders Deposition”), pp. 209-215.

41 OTT 027506; and Broders Deposition, pp. 212-223, 234-242.

Exhibit 7-C: Obama Special Project Costs

Cost by Project

Type	Obama Special Projects (Source: OTT 027506)	Amount	Amount Source
Ad	Nylon Holding, Inc.	\$ 5,000	OTT 000051-53
Ad	YRB Magazine	4,000	OTT 000068
Ad	Complex Magazine	10,000	OTT 000069-72
Ad	Antenna Magazine	3,049	OTT 000083-86
Flyers	Alloy Marketing	20,700	OTT 000087-88
Postcards	Integrity Print Group	1,950	OTT 000054-55
Posters	Heintz Weber	22,263	OTT 000057-59
Windows	Monster Media	3,679	OTT 000060-65
Windows	Monster Media	1,749	OTT 000076-78
Windows	Monster Media	1,621	OTT 000079-82
Total		\$ 74,011	