

EXHIBIT D

TO THE AP'S MOTION IN LIMINE NO. 3 TO EXCLUDE EVIDENCE OF FAIREY'S USE OF RUBYLITH AND FOR AN ADVERSE INFERENCE

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| <p>1</p> <p>UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK ----- SHEPARD FAIREY and OBEY GIANT ART, INC., Plaintiffs, vs. 1:09-CV-1123 (AKH) THE ASSOCIATED PRESS, Defendant/Counterclaim Plaintiff, vs. SHEPARD FAIREY, OBEY GIANT ART, INC., OBEY GIANT LLC and STUDIO NUMBER ONE, INC., Counterclaim Defendants. ----- VIDEOTAPED DEPOSITION OF FRANK COST Thursday, November 18, 2010 10:26 a.m. Reported by: Joan Urzia</p> | <p>3</p> <p>1 2 3 A P P E A R A N C E S: 4 5 JONES DAY 6 Attorneys for Plaintiff 7 555 South Flower Street 8 50th Floor 9 Los Angeles, California 90071 10 BY: JORDAN A. GIMBEL, ESQ. 11 WILLIAM FISHER, ESQ. 12 13 14 KIRKLAND & ELLIS LLP 15 Attorneys for Defendant 16 601 Lexington Avenue 17 New York, New York 10022 18 BY: CLAUDIA RAY, ESQ. 19 BLAIR A. SILVER, ESQ. 20 BRENDAN T. KEHOE, ESQ. 21 22 23 24 (Continued) 25</p> |
| <p>2</p> <p>1 2 November 18, 2010 3 10:26 a.m. 4 New York, New York 5 6 7 Videotaped Deposition of FRANK 8 COST, held at the offices of Kirkland & 9 Ellis, 601 Lexington Avenue, New York, New 10 York, pursuant to Notice, before Joan 11 Urzia, a Notary Public of the State of New 12 York. 13 14 15 16 17 18 19 20 21 22 23 24 25</p> | <p>4</p> <p>1 2 A P P E A R A N C E S: (Continued) 3 4 5 CALDWELL LESLIE & PROCTOR, ESQS. 6 Attorneys for Counterclaim 7 Defendant - 132 Inc. 8 1000 Wilshire Boulevard 9 Suite 600 10 Los Angeles, California 90017 11 BY: LAURIE MARTINDALE, ESQ. 12 (Via teleconference) 13 14 15 ALSO PRESENT: 16 JOHN PROKO, Videographer 17 MIKE ESSL 18 19 20 21 22 23 24 25</p> |



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| <p style="text-align: right;">229</p> <p>1 F. Cost</p> <p>2 this was created.</p> <p>3 Q. Well, let's look back at the</p> <p>4 testimony.</p> <p>5 A. What's the purpose of this</p> <p>6 duplicate? I don't get that.</p> <p>7 Q. Well, I will tell you my</p> <p>8 understanding based on the testimony is</p> <p>9 that the duplicate was created to provide a</p> <p>10 copy of the Rubylith to the AP because the</p> <p>11 original was framed and hanging in a show?</p> <p>12 A. It was an art show.</p> <p>13 Q. Yeah?</p> <p>14 MR. GIMBEL: Is there a question</p> <p>15 that you have?</p> <p>16 MS. RAY: I did have a question</p> <p>17 which was:</p> <p>18 BY MS. RAY:</p> <p>19 Q. Did you see the existence of a</p> <p>20 duplicate Rubylith affect your opinion as</p> <p>21 to whether the image in figure 8 of your</p> <p>22 report on the left was created before or</p> <p>23 after the one on the right?</p> <p>24 A. It doesn't change it at all. It</p> <p>25 doesn't change it at all.</p> | <p style="text-align: right;">231</p> <p>1 F. Cost</p> <p>2 Q. And that that is typical of the</p> <p>3 kind of normal fine adjustments that the</p> <p>4 artist would make to the Illustrator file</p> <p>5 before printing, correct?</p> <p>6 A. That is correct.</p> <p>7 Q. Those differences could result</p> <p>8 from the Rubylith having been created from</p> <p>9 the Illustrator file, correct?</p> <p>10 A. That is correct.</p> <p>11 Q. Then in paragraph 25, you say</p> <p>12 that, looking at the dark blue layer, which</p> <p>13 as I understand it appears both on the</p> <p>14 right in figure 8 in your report and also</p> <p>15 is the image in figure 10 in your report,</p> <p>16 that that dark blue layer shows the</p> <p>17 characteristic edges of a Rubylith mask</p> <p>18 that's cut with an exacto knife; is that</p> <p>19 correct?</p> <p>20 A. Right.</p> <p>21 Q. But that dark blue layer itself</p> <p>22 is not a Rubylith layer, correct? It's a</p> <p>23 digital image?</p> <p>24 A. The dark blue image was taken</p> <p>25 from the Illustrator file. I basically</p> |
| <p style="text-align: right;">230</p> <p>1 F. Cost</p> <p>2 Q. You don't have any proof, though,</p> <p>3 as to which one was created first, correct?</p> <p>4 MR. GIMBEL: Objection. Vague.</p> <p>5 Which what?</p> <p>6 BY MS. RAY:</p> <p>7 Q. Which of the two images in figure</p> <p>8 8 was created first, other than your</p> <p>9 looking at them --</p> <p>10 A. I don't have proof.</p> <p>11 Q. So it is at least theoretically</p> <p>12 possible that the image on the left in</p> <p>13 figure 8 was created first -- excuse me, on</p> <p>14 the right in figure 8 was created before</p> <p>15 the image on the left?</p> <p>16 A. It is theoretically possible.</p> <p>17 Q. Looking at your report on page</p> <p>18 14, paragraph 24, you say that Mr. Fairey</p> <p>19 modified certain features of the digital</p> <p>20 scan of the Rubylith, correct?</p> <p>21 A. I say that.</p> <p>22 Q. And you say those modifications</p> <p>23 are evident in the very subtle differences</p> <p>24 in the contour of the edges.</p> <p>25 A. Right.</p> | <p style="text-align: right;">232</p> <p>1 F. Cost</p> <p>2 extracted it from the Illustrator file.</p> <p>3 Q. And the Illustrator file is a</p> <p>4 digital file, correct?</p> <p>5 A. Right.</p> <p>6 Q. So that dark blue layer itself is</p> <p>7 a digital file?</p> <p>8 A. That's right.</p> <p>9 Q. And so it's fair that in the dark</p> <p>10 blue layer what you're seeing is a digital</p> <p>11 representation of an edge?</p> <p>12 MR. GIMBEL: Objection. Vague.</p> <p>13 BY MS. RAY:</p> <p>14 Q. You're not looking at an actual</p> <p>15 Rubylith edge, correct?</p> <p>16 A. No, I'm looking at --</p> <p>17 Q. Assuming Rubylith was used.</p> <p>18 A. Yeah, I'm looking at a digital</p> <p>19 file.</p> <p>20 Q. Okay.</p> <p>21 So looking at the edge in figure</p> <p>22 10, which is a digital file, that edge</p> <p>23 could have also been accomplished in the</p> <p>24 digital process, correct</p> <p>25 A. Yes.</p> |



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