

EXHIBIT G

TO THE AP'S MOTION IN LIMINE NO. 4 TO LIMIT THE OPINION TESTIMONY OF NEIL ZOLTOWSKI

<p style="text-align: right;">1</p> <p>UNITED STATES DISTRICT COURT. SOUTHERN DISTRICT OF NEW YORK</p> <p>-----X</p> <p>SHEPARD FAIREY and OBEY GIANT ART, INC.,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">Index No: 1:09-CV-1123 (AKH)</p> <p>VS. THE ASSOCIATED PRESS, Defendant/Counterclaim Plaintiff,</p> <p>VS. SHEPARD FAIREY, OBEY GIANT ART, INC., OBEY GIANT LLC and STUDIO NUMBER ONE, INC.,</p> <p style="text-align: center;">Counterclaim Defendants.</p> <p>-----X</p> <p style="text-align: center;">VIDEOTAPED DEPOSITION OF NEIL J. ZOLTOWSKI Tuesday, December 14, 2010 New York, New York</p> <p>Reported By: LINDA J. GREENSTEIN JOB NO. 315354</p>	<p style="text-align: right;">3</p> <p>1 A P P E A R A N C E S: 2 3 JONES DAY Attorneys for Plaintiffs & Counterclaim Defendant 222 East 41st Street New York, New York 11788 4 BY: JENNIFER B. SCHRAMM, ESQ. (212)326-3939 jbschramm@jonesday.com 5 6 7 8 9 10 KIRKLAND & ELLIS, L.L.P. Attorneys for Defendant & Counterclaim Plaintiff 11 The Associated Press 655 Fifteenth Street, N.W. Washington, D.C. 20005 12 BY: MICHAEL F. WILLIAMS, ESQ. (202)879-5123 mwilliams@kirkland.com 13 14 15 16 17 CALDWELL, LESLIE & PROCTOR, P.C. Attorneys for Counterclaim Defendant One 3 Two & The Witness 18 1000 Wilshire Boulevard Suite 600 Los Angeles, California 90017 19 BY: ROBYN C. CROWTHER, ESQ. (213)629-9040 crowther@caldwell-leslie.com 20 21 22 23 ALSO PRESENT: 24 Aydaline Garcia, Legal Video Specialist Esquire Video Solutions 25</p>
<p style="text-align: right;">2</p> <p>1 December 14, 2010 2 9:58 A.M. 3 4 5 6 7 Videotaped deposition of 8 NEIL J. ZOLTOWSKI, taken by 9 Defendant/Counterclaim Plaintiff, 10 Pursuant to Notice, held at Kirkland & 11 Ellis, L.L.P., 601 Lexington Avenue, 12 New York, New York, before Linda J. 13 Greenstein, a Certified Shorthand 14 Reporter and Notary Public of the 15 State of New York. 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">4</p> <p>1 STIPULATIONS 2 3 IT IS HEREBY STIPULATED AND AGREED 4 by and between counsel for the respective 5 parties hereto, that the sealing, filing 6 and certification of the within 7 Deposition(s) may be signed and sworn to 8 before any officer authorized to administer 9 an oath with the same force and effect as 10 if signed and sworn to before the officer 11 before whom said Deposition(s) was (were) 12 taken; 13 14 IT IS FURTHER STIPULATED AND AGREED, 15 that all objections, except as to the form, 16 are reserved to the trial. 17 18 19 * * * 20 21 22 23 24 25</p>



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2 A. It was people under my direction

3 performed that analysis.

4 Q. Are you referring to Mr. Dennis?

5 A. Yes.

6 Q. And Mr. Coffman?

7 A. Mr. Dennis.

8 Q. For purposes of this deposition,

9 would you do me the favor of, if you've

10 done something personally, then take

11 ownership of it and say "I" or "I conducted

12 this analysis."

13 But, otherwise, if it was

14 somebody else who conducted parts of your

15 analysis, could you specify who did it for

16 me?

17 A. Yes. I will do my best to do

18 so.

19 Q. Just as a convention, if we

20 could drop the "royal we" or the "editorial

21 we," that would be useful for my purposes.

22 You understand.

23 A. Sorry. It's hard to teach an

24 old dog new tricks.

25 We do all of our work in teams,

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2 so it's always a collective we.

3 Q. Understood.

4 And I just want to make clear

5 that when I ask "did you," I'm actually

6 referring to you. And I'll try on my end

7 to refer to your team, if I'm referring to

8 your team.

9 Okay?

10 A. Sure.

11 Q. At the time that you were

12 reviewing The Associated Press's price

13 guides that you had available to you in the

14 course of preparing your opinions in this

15 case, did you understand that there were

16 categories that were not good fits with the

17 items that you were reviewing?

18 A. Yes. There were some that

19 seemed to be better fits than others, but

20 nothing that seemed to fit perfectly, since

21 the pricing guides were for editorial use.

22 Q. That is, you didn't see any

23 categories for T-shirts; right?

24 A. Correct.

25 Q. You didn't see any categories

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2 for postcards; correct?

3 A. That's correct.

4 Q. You didn't see any categories

5 for commercial use at all; right?

6 A. That's correct.

7 Q. You've assumed in developing

8 your opinions that there was a separate

9 price guide that the AP possessed, but that

10 you did not have available, that provided

11 more accurate quotes for licensing fees?

12 A. Yes. As I stated, I assumed so

13 based upon Ms. DeGrave's testimony, as we

14 discussed, where she is discussing that she

15 would simply go to their standard price

16 book to price out a certain number of

17 handbags, as we discussed on pages 112 and

18 113, and then also a certain volume of

19 T-shirts on pages 135 and 136.

20 And since those categories are

21 not listed within the editorial pricing

22 guide, I assumed that what she was

23 referring to was a separate pricing guide,

24 which she would be able to reference to do

25 that pricing determination.

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2 Q. Do you believe that not having

3 access to a separate AP pricing guide that

4 related to commercial or promotional uses

5 hampered your analysis?

6 A. No, it did not.

7 It would have been helpful to

8 have had that pricing guide.

9 However, Ms. DeGrave's testimony

10 is that she and her team go to Getty Images

11 to price out commercial uses when they

12 don't have access to their own system.

13 And, therefore, the Getty Images

14 website provides a user to price out the

15 use of an image on a commercial or

16 promotional basis.

17 Q. Did you ever say in your expert

18 report that it would have been helpful to

19 have the AP pricing guide that related to

20 commercial and promotional uses?

21 A. I don't believe so.

22 Q. Do you believe as we sit here

23 that it would have assisted your analysis

24 to have any AP pricing guide that related

25 to commercial and promotional uses at the



<p style="text-align: right;">129</p> <p>1 NEIL J. ZOLTOWSKI</p> <p>2 offered that price to the licensee.</p> <p>3 Q. Based on that colloquy in this</p> <p>4 deposition, it's your opinion and it was</p> <p>5 your assumption in developing your report</p> <p>6 that there are instances where sales</p> <p>7 representatives from The Associated Press</p> <p>8 have no discretion to diverge from their</p> <p>9 licensing prices as set forth in the</p> <p>10 pricing guide?</p> <p>11 A. They may have discretion, but</p> <p>12 there's instances where they obviously</p> <p>13 don't need any discretion and they simply</p> <p>14 go straight to the book and pull the price.</p> <p>15 Q. My question wasn't about whether</p> <p>16 you believed there are instances where they</p> <p>17 don't need discretion.</p> <p>18 My question was whether you have</p> <p>19 any basis for stating that there are</p> <p>20 instances where the sales representative</p> <p>21 has no discretion; right?</p> <p>22 A. I do not, correct.</p> <p>23 Q. Do you have any basis for</p> <p>24 disputing the statement that The Associated</p> <p>25 Press views each licensing transaction as</p>	<p style="text-align: right;">131</p> <p>1 NEIL J. ZOLTOWSKI</p> <p>2 for the same use of the same image that is</p> <p>3 in the same quantities and to the same</p> <p>4 extent, The Associated Press would always</p> <p>5 quote the same price?</p> <p>6 A. That would be my assumption, and</p> <p>7 that comes from the fact that the AP</p> <p>8 utilizes the Getty Images pricing</p> <p>9 guidelines throughout the Getty Images</p> <p>10 website, and you can price various photos</p> <p>11 on that website for the same exact use.</p> <p>12 Different photos, and get the same exact</p> <p>13 price.</p> <p>14 Q. So the basis for your assumption</p> <p>15 is Ms. DeGrave's testimony about the use of</p> <p>16 the Getty images website?</p> <p>17 A. Yes.</p> <p>18 Q. Does Ms. DeGrave say in her</p> <p>19 deposition that the AP relies entirely upon</p> <p>20 the Getty Images website?</p> <p>21 A. No. She states that when they</p> <p>22 do not have access to their own pricing</p> <p>23 guide, they utilize the Getty Images</p> <p>24 pricing guide as a framework.</p> <p>25 Q. Do you know as we sit here</p>
<p style="text-align: right;">130</p> <p>1 NEIL J. ZOLTOWSKI</p> <p>2 unique?</p> <p>3 A. I would say, yes, unless it's</p> <p>4 the same image for the same exact use, then</p> <p>5 that wouldn't be unique.</p> <p>6 Q. What do you mean?</p> <p>7 A. Meaning if I decided to license</p> <p>8 a specific image for a thousand T-shirts</p> <p>9 that have the specific image printed on the</p> <p>10 front, and you go and ask for a license for</p> <p>11 a thousand T-shirts that are printed on the</p> <p>12 front, I would assume you would probably</p> <p>13 get the same price.</p> <p>14 Ms. DeGrave said there's no</p> <p>15 change in price based on demand, and she</p> <p>16 specifically states -- I think at one point</p> <p>17 she said, "The price is the price is the</p> <p>18 price of an image."</p> <p>19 Q. Did you say you would assume</p> <p>20 that they probably would get the same</p> <p>21 price?</p> <p>22 A. They most likely would get the</p> <p>23 same price, and I would say that most</p> <p>24 definitely would get the same price.</p> <p>25 Q. It's your sworn testimony that</p>	<p style="text-align: right;">132</p> <p>1 NEIL J. ZOLTOWSKI</p> <p>2 whether Ms. DeGrave was referring to the</p> <p>3 use of the Getty Images website as a factor</p> <p>4 or as something that would be a dispositive</p> <p>5 indication of price?</p> <p>6 A. I think she referred to it as an</p> <p>7 indication of price, specifically related</p> <p>8 to when their pricing image is out for</p> <p>9 their clients and they don't have access to</p> <p>10 their own system.</p> <p>11 Q. Is it your understanding that</p> <p>12 The Associated Press makes final licensing</p> <p>13 price decisions based on the Getty Images</p> <p>14 website?</p> <p>15 A. Based upon Ms. DeGrave's</p> <p>16 testimony, I think they utilize that and</p> <p>17 may either use it verbatim, off of the</p> <p>18 website, or they may tweak it slightly</p> <p>19 either way, ratchet it up or down slightly.</p> <p>20 But I believe they use it as a</p> <p>21 guideline to come up with a price if they</p> <p>22 don't have access to their own system.</p> <p>23 Q. What's the basis for your</p> <p>24 testimony about "tweaking it up or down</p> <p>25 slightly"?</p>



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 2 A. I don't have a basis.
 3 It's simply on assumption based
 4 upon, the AP might have their own potential
 5 way of pricing off of the Getty Images
 6 website, but most likely would probably
 7 take it verbatim off of the website.
 8 Q. Why do you say "most likely
 9 would take it verbatim"?
 10 A. Simply from Ms. DeGrave's
 11 testimony.
 12 Q. Does Ms. DeGrave testify that
 13 she would take pricing from the Getty
 14 Images website verbatim?
 15 A. She states that she would
 16 utilize it when she has no access to her
 17 own system when she's pricing an image for
 18 a client.
 19 Q. Did she say that she would make
 20 final pricing decisions based on the Getty
 21 Images website?
 22 A. I don't recall.
 23 Q. Do you know whether she would
 24 make final pricing decisions based on the
 25 Getty Images website?

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1 NEIL J. ZOLTOWSKI
 2 MS. SCHRAMM: Objection. Form.
 3 Speculation.
 4 BY MR. WILLIAMS:
 5 Q. Do you know?
 6 A. No, I do not know.
 7 Q. Is it fair to say that your
 8 entire basis for the assumptions that you
 9 made about the AP's licensing structure are
 10 based on Ms. DeGrave's testimony in her
 11 deposition?
 12 A. No, it is not.
 13 Q. What else was a factor?
 14 A. The AP produced a number of
 15 licenses in this litigation, which I
 16 reviewed.
 17 Q. That is, there were licenses
 18 that you considered and there was
 19 Ms. DeGrave's testimony; correct?
 20 A. Correct.
 21 Q. Was there anything else that
 22 formed the basis for your assumptions on
 23 the AP's licensing practices?
 24 A. There was additional deposition
 25 testimony from Mr. Dale that I've relied

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1 NEIL J. ZOLTOWSKI
 2 upon as well.
 3 Q. What did Mr. Dale say?
 4 A. He simply stated that there were
 5 pricing guides that did exist within the
 6 AP, and those pricing guides were attached
 7 to his deposition as exhibits.
 8 Q. Apart from the existence of the
 9 pricing guides and the fact that they were
 10 attached to his deposition, did Mr. Dale
 11 say anything else that contributed to the
 12 assumptions that you relied upon in forming
 13 your report with respect to the AP's
 14 licensing structures?
 15 A. Also the Getty Images website,
 16 which Ms. DeGrave stated was utilized by
 17 the AP in certain instances.
 18 Q. How did the Getty Images website
 19 contribute to the assumptions on which you
 20 relied relating to the AP's licensing
 21 structures?
 22 A. The Getty Images website offers
 23 a user to price out an image for various
 24 commercial uses, and we went on that
 25 website to see if you priced out certain

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 2 images for certain uses, what you would get
 3 for a license fee that must be paid by that
 4 licensee.
 5 Q. That's not the structure of the
 6 AP's pricing for its licensing; right?
 7 A. My understanding, as I stated
 8 previously, is that Ms. DeGrave states that
 9 the AP will use the Getty Images website
 10 when they don't have access to their own
 11 system.
 12 Q. The extent that the AP uses the
 13 Getty Images website is something that you
 14 learned about entirely from Ms. DeGrave's
 15 deposition testimony?
 16 A. Yes.
 17 Q. To the extent that Ms. DeGrave's
 18 deposition testimony on those points is
 19 unclear, you'll agree that your assumptions
 20 may also be misplaced?
 21 MS. CROWTHER: Objection.
 22 Assumes facts.
 23 A. Could you point me to where they
 24 would be unclear?
 25 Q. You were looking page 136?



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 2 A. That testimony. That specific
 3 sentence that I read.
 4 Q. That it was fair for you to make
 5 the assumption that there was some
 6 instances that the AP would not diverge
 7 from the licensing guide based on the
 8 question and answer that you saw on page
 9 136?
 10 A. What I'm going off of is
 11 Ms. DeGrave has a team which she oversees.
 12 She has faith in her team and
 13 she's just restating one of her best sales
 14 reps must have used the book because that's
 15 the price she quoted to a licensee.
 16 So, yes, based upon that
 17 testimony, based upon that sentence, and
 18 based upon that in general, yes, that's my
 19 opinion.
 20 Q. Based also on your assumption
 21 that there was a price guide that related
 22 specifically to the sale of the merchandise
 23 at issue there; correct?
 24 A. There had to have been a sales
 25 guide, yes, for her to actually price out

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 2 of what they call, quote-unquote, "the
 3 book."
 4 Q. But you're comfortable with the
 5 framing of the questions in this deposition
 6 and with the clarity of Ms. DeGrave's
 7 answers that you feel comfortable on
 8 extrapolating from these questions and
 9 answers your assumptions about the AP's
 10 pricing practices?
 11 MS. CROWTHER: Objection.
 12 Vague and compound.
 13 Q. I'll break it down.
 14 You're comfortable, based on the
 15 clarity of the questions and the answers in
 16 this deposition, in reaching the
 17 assumptions that you've made about the AP's
 18 pricing practices?
 19 A. Yes. I am.
 20 MR. WILLIAMS: Let's go off the
 21 record.
 22 THE VIDEOGRAPHER: The time is
 23 12:17 and this ends Tape Number 1 of the
 24 Videotaped Deposition of Neil Zoltowski.
 25 (A luncheon recess was taken

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1 NEIL J. ZOLTOWSKI
 2 from 12:17 p.m. to 1:15 p.m.)
 3 THE VIDEOGRAPHER: The time is
 4 1:15. This begins Tape Number 3 of the
 5 Videotaped Deposition of Neil Zoltowski.
 6 BY MR. WILLIAMS:
 7 Q. Mr. Zoltowski, do you have any
 8 experience in news reporting?
 9 A. No, I do not.
 10 Q. Do you have any background in
 11 news reporting?
 12 A. No, I do not.
 13 Q. Do you have any experience in
 14 photojournalism?
 15 A. No, I do not.
 16 Q. Do you have any background in
 17 photojournalism?
 18 A. No, I do not.
 19 Q. Do you have any experience in
 20 photography licensing?
 21 A. No, I do not.
 22 Q. Do you have any background in
 23 photography licensing?
 24 A. No.
 25 Q. Before this case, have you had

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 2 any experience whatsoever with respect to
 3 the licensing of photography?
 4 A. Not that I recall.
 5 Q. Before this case, did you have
 6 any cases involving copyrights for
 7 photographs?
 8 A. No, not that I recall.
 9 Q. Have you ever spoken to anybody
 10 outside of the context of this case about
 11 the market for licenses of images?
 12 A. No, I have not.
 13 Q. In the course of your work on
 14 this case, did you speak with anybody at
 15 The Associated Press about the market for
 16 photography licensing?
 17 A. No, I did not.
 18 Q. In the course of your work on
 19 this case, did you speak with anybody at
 20 Obey Clothing regarding the market for
 21 photography licensing?
 22 A. No, I did not.
 23 Q. In the course of your career,
 24 have you ever encountered anyone who put
 25 himself forward as an expert in the field



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 2 for checkout in a shopping cart on the
 3 Getty Images website?
 4 A. Yes. That's what it appears to
 5 be.
 6 Q. Is this the image of President
 7 Clinton that you used in your analysis of
 8 what you called "a similar image under the
 9 considerations and criteria similar to this
 10 license"?
 11 A. Yes, it is.
 12 Q. Do you see there are
 13 restrictions on the use of this image of
 14 President Clinton?
 15 A. Yes, I do.
 16 Q. Is there a restriction on its
 17 commercial use; correct?
 18 A. Correct.
 19 Q. Under "Release Info," it says:
 20 "This image has no model or
 21 property release. Any commercial use
 22 requires additional clearance. Contact
 23 your local office to see if we can clear
 24 this image for you."
 25 Right?

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 2 A. Yes.
 3 Q. It includes the same text after
 4 the header, "Restrictions"; correct?
 5 A. Correct.
 6 Q. Did you see these restrictions
 7 before you stated that you could purchase a
 8 license without contacting a sales
 9 representative for the photograph of
 10 President Clinton that you used?
 11 A. I don't recall.
 12 I stated that I had put it into
 13 my shopping cart and that's what I recall.
 14 That was -- I may have done it a month or
 15 month and-a-half ago, so it's possible.
 16 I don't believe I remember
 17 seeing that language, though.
 18 Q. Did you do anything else besides
 19 put it in your shopping cart?
 20 A. No, I did not.
 21 Q. After you put it in your
 22 shopping cart, did you review to see
 23 whether or not the screen created any
 24 limits on the commercial use of the image
 25 that you selected?

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1 NEIL J. ZOLTOWSKI
 2 A. As I stated, I may or may not
 3 have. I just don't recall.
 4 Q. If there were additional limits
 5 on the commercial use of the image that you
 6 selected, would you agree with me that it
 7 isn't really a suitable image for
 8 determining the pricing point based on a
 9 pricing guide ' la carte basis with Getty
 10 Images?
 11 A. No. I think it still is a
 12 suitable proxy for an image, and it's
 13 possible that the clearance might be as
 14 simple as Getty Images understanding what
 15 exactly you're using the image for.
 16 Q. You don't know that one way or
 17 the other; correct?
 18 A. Correct.
 19 Q. You're speculating; right?
 20 A. Yes.
 21 Q. For all you know, Getty Images,
 22 upon receiving your call, would ask
 23 additional information about you and the
 24 uses and quote a different price; correct?
 25 A. It's possible.

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1 NEIL J. ZOLTOWSKI
 2 Q. Do you have any reason for
 3 thinking that wouldn't be the case?
 4 A. I don't have reason to believe
 5 one way or another.
 6 Q. You relied upon the price for
 7 this President Clinton photograph in
 8 determining your conclusion for the most
 9 likely price of a subsequent license for
 10 250,000 T-shirts used for retail use to
 11 promote political views; correct?
 12 A. Yes, that's correct.
 13 Q. You did so without speaking to
 14 anybody at Getty Images; correct?
 15 A. Yes, that's correct.
 16 Q. You did so without speaking to
 17 anybody at The Associated Press; correct?
 18 A. Yes, that's correct.
 19 Q. If, in fact, The Associated
 20 Press and Obey Clothing had engaged in
 21 subsequent licensing negotiations that
 22 attempted to expand upon an initial 5,000
 23 unit license for merchandizing T-shirts,
 24 what is your opinion of the relative
 25 bargaining power between The Associated

