

EXHIBIT A

TO THE AP'S MOTION IN LIMINE NO. 5 TO PRECLUDE OBEY CLOTHING FROM PRESENTING SHEPARD FAIREY'S EXPERT WITNESSES AT TRIAL

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August 22, 2010

The Hon. Alvin K. Hellerstein
United States District Court for the Southern District of New York
500 Pearl St.
New York, NY 10007-1312
Fax: (212) 805-7942

Re: Shepard Fairey et al. v. The Associated Press, Case No. 09-01123

Dear Judge Hellerstein:

As the Court directed at the last conference in this matter on May 28, 2010, the Parties have worked together cooperatively to discuss the extent to which they believe expert testimony would be useful and the likely topics of such expert testimony. The parties have also agreed to a series of stipulations intended to limit the scope of discoverable expert materials, and therefore to reduce the burden and expense of experts, and also to address certain of the issues in dispute and thus eliminate the need for expert testimony as to those issues.

The Number and Types of Experts Proposed

The Parties have conferred and have agreed upon a limited set of experts that would help illuminate the remaining matters in dispute.

Plaintiffs and Counterclaim Defendants Shepard Fairey and Obey Giant Art, Inc. and Counterclaim Defendants Obey Giant, LLC, and Studio Number One, Inc. (collectively, "Plaintiffs") propose to present the testimony of four or five experts:

(a) an accountant, who will focus primarily on the costs incurred and revenues received by Plaintiffs in connection with the preparation and distribution of the Obama image. These figures are relevant both to (i) the proper measure of damages, if any, owed by Plaintiffs should the Associated Press prevail on the merits and (ii) possibly to the question of the degree to which Plaintiffs' conduct was "commercial" or "noncommercial" in character, which in turn is one of the issues sometimes considered under the auspices of the first of the four fair-use factors identified in 17 U.S.C. §107.

(b) an economist, who will focus primarily on (i) the effect of Plaintiffs' conduct on the market for the Obama Photograph¹ (which is most germane to the

¹ In this letter, the "Obama Photograph" shall be defined as the photograph of Barack Obama that appears both as Exhibit A of Plaintiffs' Amended Complaint for a Declaratory Judgment (Nov. 13, 2009) ("Plaintiffs' Amended Complaint"), and as Exhibit B of The Associated Press's First Amended Answer, Affirmative Defenses, and Counterclaims (Nov. 12, 2009) ("The Associated Press's Counterclaims"). The

fourth of the four factors that 17 U.S.C. §107 indicates must be considered when applying the fair-use doctrine); and (ii) the proper measure of damages, if any, owed by Plaintiffs should the Associated Press prevail on the merits

(c) one or two experts in digital photography and lithography, who will focus primarily on how Shepard Fairey created the Hope image

(d) an expert on media studies or art history, who will focus primarily on the customary practices within which Mannie Garcia and Shepard Fairey worked. Attention to those practices would be helpful both in ascertaining the aspects of the Obama Photograph that constitute copyrightable “expression” and in applying the fair-use doctrine to Fairey’s behavior under one or more of the factors set forth in 17 U.S.C. §107.

Counterclaim Defendant One 3 Two, Inc., proposes to offer two experts: an accountant, who will focus primarily on the costs incurred and revenues received by One 3 Two in connection with the distribution of products related to the Hope image; and an expert on the clothing industry, who will focus primarily on the proper measure of damages, if any, owed by One 3 Two should the Associated Press prevail on the merits.

The Associated Press proposes to offer one expert affirmatively: an accountant who will report on the revenues and profits earned by Shepard Fairey and the other Plaintiffs and Counterclaim Defendants from the sale of the Obama Works. The accountant’s report is relevant to (i) the proper measure of damages for Plaintiffs and Counterclaim Defendants sale and use of the Obama Works, and (ii) the “commercial” nature of the Obama Works under the first fair-use factor identified in 17 U.S.C. §107. In addition, The Associated Press will offer four or five rebuttal experts to the experts proposed by Plaintiffs and Counterclaim Defendants, including:

- (a) An economist to rebut Plaintiffs’ economist and explain the licensing market for The Associated Press’s photo archive and the harmful effects of Mr. Fairey’s unlicensed use of the photo that he used to make the Obama Works;
- (b) One expert to rebut Plaintiffs’ expert concerning how Mr. Fairey purportedly made the Obama Works;
- (c) One or two experts to rebut Plaintiffs’ expert concerning one or more of the fair use factors under 17 U.S.C. §107: (i) the purpose and character of the use, (ii) the nature of the copyrighted work, (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (iv) the effect of the use upon the potential market for or value of the copyrighted work;
- (d) If necessary, one expert to rebut Obey Clothing’s expert on “clothing industry” issues.

“Obama image” shall be defined as the representation of Barack Obama created by Shepard Fairey that appears in the “Progress” poster and “Hope” poster, copies of which are set forth in Exhibits B through G of Plaintiffs’ Amended Complaint. “Obama Works” shall be defined as the allegedly infringing posters and merchandise containing the Obama image, examples of which appear as Exhibits B through G of Plaintiffs’ Amended Complaint, and Paragraphs 54 and 56-57 of The Associated Press’s Counterclaims.

Stipulation to Limit the Scope of Discoverable Expert Materials

With respect to the processes of developing expert testimony of these four sorts, the parties propose to stipulate as follows:

(a) The Parties will not be obligated to produce, nor will any Party seek to discover, (i) experts' notes, (ii) drafts of expert reports, (iii) drafts of expert declarations or affidavits, or (iv) written communications between experts and counsel in this litigation.

(b) Additionally, the Parties will not seek discovery into the substance of or proposed edits to any drafts of expert reports or declarations/affidavits, including the substance of any comments made on drafts of expert reports or declarations/affidavits, the substance of any proposed edits to expert reports or declarations/affidavits, the substance of any communications with counsel regarding the opinions expressed in the expert reports or declarations/affidavits.

(c) The Parties shall be entitled, however, to seek discovery regarding the process undertaken by expert witnesses in preparing expert reports or declarations/affidavits, such as who prepared each section of the report or declaration/affidavit, how much time was spent drafting the report or declaration/affidavit, how many drafts of the report or declaration/affidavit were prepared, what documents were considered by the expert, who provided such documents to the expert, and who the expert spoke with during the course of drafting a report or declaration/affidavit or preparing for deposition testimony.

Stipulation Regarding Chain of Custody of "Rbylith" Transparencies

Mr. Fairey testified that one of the steps in creating the Obama image involved his cutting by hand four "rbylith" transparencies, using techniques traditional in screenprinting. He further testified that, before the start of this litigation, he incorporated two of those rbyliths into a separate piece of artwork for exhibition at the Institute of Contemporary Art (ICA) in Boston. In making that artwork, Mr. Fairey testified that he altered one of the two rbylith transparencies — specifically, by removing the bottom portion of it. The Associated Press had requested a copy of each individual rbylith transparency in discovery. However, because two of the rbylith transparencies were already incorporated into a separate piece of artwork, Plaintiffs instead prepared a digital scan of that artwork and have gathered – and made available to The Associated Press – information showing that the artwork in question has been outside of the custody and control of Fairey or his employees since the time it was first sent to the ICA. The Associated Press agrees that this information is sufficient to support the following stipulation:

The Parties stipulate that the document identified by Bates number Fairey 0127212 consists of a true and correct digital copy prepared by A&L Imaging of a piece of artwork, entitled "Obama Hope," which contains two rbyliths. In preparing the artwork, Fairey altered one of those two rbyliths – specifically by removing the bottom portion of it. The artwork and the rbyliths it contains were

delivered to the Institute of Contemporary Art (ICA) in Boston on January 26, 2009, and since then have been on display at the Institute of Contemporary Art, the Andy Warhol Museum in Pittsburgh, and the Contemporary Arts Center in Cincinnati. Since January 26, 2009, the artwork and the rubyliths it contains have not been altered further.

Proposed Schedule for Expert Discovery

With respect to the schedule for expert discovery, the parties have proposed the following:

October 1, 2010: Expert reports due
November 2, 2010: Rebuttal experts reports due
November 23, 2010: Close of expert discovery

The initial group of submissions – in other words, those due on October 1 – would include all expert reports that pertain to issues as to which each party bears the burden on proof. Thus, for example, The Associated Press would submit on that date expert reports germane to The Associated Press’s contention that Plaintiffs have willfully infringed The Associated Press’s rights in and to the Obama Photograph under 17 U.S.C. §106 or to the measure of damages, if any, while Plaintiffs would submit on that date reports germane to Plaintiffs’ contention that Fairey’s behavior is justified as a fair use.

Sincerely,

William W. Fisher III (Counsel for Shepard Fairey)

Geoffrey Stewart (Counsel for Shepard Fairey)

Robyn Crowther (Counsel for Obey Clothing)

Dale Cendali (Counsel for The AP)

Cc: All counsel of record