

EXHIBIT D

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

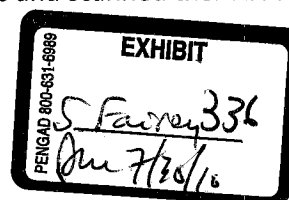
Bates: FAIREY126906

Custodian: Simon Steinhart

Shepard Fairey (SF): So, you know, I didn't - I wanted to create an Obama image from a long while back, basically right after he announced his candidacy. I'd been impressed by his speech at the BNC in 2004 and then I checked out some information on the web and liked his ideas - liked the fact that he had opposed the war in Iraq and that he wanted to reduce the power of lobbyists in Washington. So I wanted to make a poster to support him, just like I do with a lot of different political causes, you know, that I read or am commenting on favorably or against political things going on. But I actually didn't want to, unlike most of my posters, where I'd just make an image that comments on a topic without really consulting anyone. I didn't want to hurt Obama's cause because I'm a street artist that's been arrested 14 times at that point, and didn't want to, you know, be seen as too - you know, too radical and too outside the mainstream and be seen as a liability.

So, I put the word out to some people and finally my friend Yosi Sargent, who I ran into at an Adidas event right around Halloween, at the end of October 2007. Um, He said that he knew some people in the campaign and maybe he could get permission for me to do an Obama image. And I didn't hear back from him until the middle of January, I wanna say maybe about 15th or 16th of January um and he just said: Hey, I got the green light. Go ahead and make an Obama image. Got the green light from the campaign, they're cool with you making an image. That very evening after I spoke to him I just did a Google search for an image that I thought would be a good reference for a portrait. And the concept that I really wanted in the portrait was that it would be red, white, and blue, it would be patriotic, but it would be slightly - slightly more muted colors to it - slightly more muted mid tones of blue to work better with the way the shadows in the face would actually work. But I wanted to split the face or the image into one-half falling into deeper shadows (which would be red), and the other half falling into the lighter shadows and highlights (which would be blue and cream), with the idea that the blue states and the red states were converging and, blah blah blah.

I also really liked a couple of images that I'd seen over the years. One was the famous portrait of Che Guevara, that turned into a very very ubiquitous icon of Che because of the gaze that he - the position of his eyes sort of looking sort of into the future; so that was part of what I was looking for. There's another one of Robert F. Kennedy that was similar that I liked. So this was the general criteria. So looking through a bunch of images, I eventually found an image of Obama, with George Clooney at the Panel for Darfur from 2006. It had the right look and I realized that if I tinkered with the way the shadows were working and refined and stylized the image, that that could work as a starting point. So then I tweaked the contrast and the shadow areas, did some photo shop work on the image, and then adjusted the angle of the gaze and the slant of the shoulders really slightly. And then had what I thought was a good rough to start from where I could get the desired results after I illustrated it. So then I illustrated it. I illustrated each layer for the colors and scanned them back into the computer and



composited them. First I put the word "PROGRESS" beneath the image and sent the image out to be screen printed. I - you know, when I found the image I recall that it said that it was an AP photo, which I've acknowledged, but it didn't have the name of the photographer. And based on the history Pop Art, I didn't think that it was consequential at all. I felt that I was making an image that was going to transform the aesthetics and the intent of the original and that neither did I need to know the name of the photographer or deal with the AP in working from this image as a reference. Um, but I did not actually know that the photo was by Manny Garcia until - I think, it was a couple days after the inauguration. But anyway, I also of course had no idea that the image was going to become so famous. Um, you know when I made the image, it was a couple of weeks before Super Tuesday and my thought was, um, it's extremely important for me to get an image out quickly because there's a lot at stake on Super Tuesday - February, I think 5th I think was when it was - and if I don't have - get an image out there now, the window of opportunity to make an impact might be missed. And so, I quickly did the illustration, started a print run of posters, and posted the illustration on my website. And the illustration I'd actually done another poster that said "VOTE" that I had...that I released at the same time. I think it came out a few days before the Obama illustration, I don't remember exactly. But once I knew that I might be able to release - that I might be able to make an Obama image - I wanted to first prime people by just putting an image out there that it was encouraging them to vote in the primaries in general. Anyway, you know, a lot of people have asked me why I didn't license the image. There's multiple reasons. First of all, I thought and I continue to think, a transformative work both in aesthetics and intent, falls under fair use, and one shouldn't have to license it. Secondly, licensing involves permission and the AP claims to be non-partisan. There's a possibility they may have said no, you can't use it, you can't license it for that purpose. And also, there's the time issue, it takes time to license things and there wasn't time in order to get something out. So I definitely don't think that the AP should have its photos lifted if it's used for its original intent. If I were doing an article about George Clooney and Barack Obama being on a panel discussing Darfur and selling that article or using that article to drive traffic to the site that I was charging for advertising on, that would impede the AP's ability to charge for that same image for that same purpose. However, the way I used the image was not competing with their original market or intent of the image and if anything, it gave extra value to The Associated Press image. Once the poster became so famous, it was a photo that was a reasonable starting point, but not remarkable in and of itself, and now it's associated with something that became remarkable. Anyway, the image quickly became - it became viral and was being emailed all around the web, to people putting it up on blogs, news sites, people were using it as their Facebook pages, MySpace, their email signatures, and shortly after that, I printed a screen print run, sold those and used the money to then from those - the 350 I sold - to print up another 10,000 offset prints which then I switched the word from PROGRESS to HOPE. Within a week, there were 10,000 print outs there. I know that several thousands were given away at Oprah and Michelle Obama, I think Michelle Obama was there, I was Oprah. I was in the hospital Madeline was being born, but Yosi went and gave 3,000 posters away at a UCLA Oprah rally for Obama, so immediately it was being seen - the image was being seen on the national news. I remember being in the hospital and seeing it on CNN, and Yosi sending me emails, while I was in the hospital while Madeline was being born, saying that it was really going crazy on the web, I checked out Google and saw a **ton** of hits for it: Some people saying it's great, some people saying the poster looks too Communist to be helpful to Obama, but it was getting a lot of attention and it really

should. There was a lot of emotion about Obama himself, which I still think is the reason for the success of the image because a portrait that had a very human connection to Obama hadn't been made, that could become that, that symbolic representation of him as a human being, not just a logo for a website or a slogan. And I think that people need those feelings of connection, especially to someone like Obama who's such a good speaker and seems to be coming from such a populist and idealist place. I think that, this type of image just reinforced or amplified those feelings that people had about Obama, the human being, not Obama the campaign or the rhetoric machine. That's why I think it really worked. When you look at what people got out of the image, the feelings of hope, optimism, change, progress, all those things that came to be associated with the image. And you go back to the source image, the - most people that I've talked to say that they don't feel that the source image puts those concepts across, and in fact at the time Obama was photographed, he was actually listening to a conservative singer, I forgot the guy's name, but anyway, most people feel, would agree that the power comes from the way that the features were stylized and idealized, and the fact that he's been turned into this Patriotic color palate, he's no longer - he's also no longer perceived as a black man as much, which a lot of people have maybe a little bit of discomfort with, that's something people have said to me that they feel like it made him American, not black or white, and took the race issue out of it a bit. But anyway, as most people know the thing just built from there, every ...I sold the 350 posters, and used that money to print out 10,000 more, and then we sold an offset round of 750 and used that money to print many thousand more prints and we started making stickers as well. Then I was asked by a couple different people if I would make fine art pieces. I made those fine art pieces and the money from the fine art, a couple of fine art pieces, and the money from those went into making more posters, also we started making stickers, the stickers at first were just a paid for sticker run of... I think 50,000 stickers, but then the sticker vendor, who I don't want to name because ...I don't want him involved necessarily until this thing is resolved to cough up any royalties on it. But the sticker vendor then offered to sell the stickers and then roll all the profits back into producing more stickers that could be given away, so the sticker vendor basically took the same model that I was using, selling the prints on my site and rolling the money back into making more prints and did the exact same thing. Then there were t-shirts that were made and the same thing was done there. The money from the t-shirts was used to make bus stop ads for Philadelphia before the Pennsylvania Primary, it was used to fund a flyer, a campus-wide voter outreach flyers that went out to college campuses nationwide. And then we also funded the "Manifest Hope" art show at the democratic convention in Denver, mostly with money from prints and t-shirts that had been sold. So for a year, no one.... people asked me about the inspiration for the image, I explained that I had gotten the reference from the internet and no one ever asked me... not one interview: "who was the original photographer?" So it actually never came up to me as an issue that I thought would become volatile, so I actually never researched who the photographer was.

Interviewer: Did you ever bookmark the site or whoever you got it from, or do you remember that at all?

SF: No, I didn't. Because when you go through Google, you can just click on the image and then it'll say "see larger size", and you know I think I remember it being AP because was maybe a watermark on it or something. I can't remember exactly why I remembered it was AP, but there was something that

alerted me to the fact that it was an AP image, so I knew it was an AP image, but I never bookmarked the site, and when I do these illustrations, you know, I make, I do my tinkering and stuff but once I've done the final, I always throw the stuff away that's not stuff that I need to keep because it's not - it's like the sketch phase stuff because it just takes up memory, on the computer. Not that I'm trying to hide anything. If you look through my computer, sometimes there will be a reference photo that I worked from, but usually I throw that stuff away just because it takes up hard drive space, sometimes I'll save stuff, if I wanna - you know, if I wanted to be able to go back and reference it for something. With that thing, I made the sets, which I still have, those are the rubilyth sets. Two of them are here, and two of them are composited in the show, in Boston, but I think I still have, I'm pretty sure I still have just the printouts of what I worked from to do the illustration, but I don't have the digital files.

Interviewer: Has your lawyer (inaudible - sounds like maybe turned off tape recorder and then restarted)?

SF: Especially if you don't talk about it with anybody. Oh, we have this tape of Shepard talking about the case.

Interviewer: Right.

SF: But anyway, I'm sure that when it all goes to court, I'll have to produce whatever I have so -

Interviewer: Right.

SF: I'll hold on to some of the materials. But I actually I think that the - might even - I know that I was at my house, and pulled a reference while I was at home home.

Interviewer: You could probably find it in your history - in your browser history?

SF: Except that when my computer was charging on the ground, the chair fell over on it and - I think that's the computer - I have two computers that I work on at home, I think that's the computer where I smashed the drive.

Interviewer: (Laughs)

SF: But I keep duplicates of most of the stuff that I do on my office computer, so it might be in there, but I know that I have the print outs, so, but either way, what I'm really fighting here is not the fact that I worked from the AP photo.

Interviewer: Right.

SF: Because I've acknowledged that all along. What I'm fighting is that it's a - that is it fair use to work from a photograph especially when the market and the intent of the photograph are different and it's of a leader that - whose likeness is public domain. Like, you know, people - it's well known that likenesses of public leaders are - publicly just don't have the same rights as a movie star or a rock star in terms of reproduction of their likeness because movie stars and rock stars are using their likeness as part of their income. Where a public figure - however, if you're going to make a public figure people need to be able

to critique them, however. So that concept I think is a well thought out concept. The likeness of a leader, people in government should be public domain. However, then there's the next step which is - but if you're creating a likeness how do you create it other than from a photographic reference unless you're able to, as an artist, have the person come do a portrait sitting for you.

Interviewer: Right.

SF: Which for me as an artist that's done a lot of stuff that was anti what the government was doing at the time, the likelihood of me getting some personal time to do a photo session --

Interviewer: Four or five hours...

SF: -- with Barack Obama, or have him pose while I sketch him, was most likely, if not definitely, out of the question. For tons of other artists who, whether they're making stuff that's for a leader or against aspects of their policy, but need to have a likeness in their work, for most of them, licensing a photograph is going to be cost prohibitive, and I think that that kind of expression is a really important part of political dialogue, I think it creates new meaning and new communication, the art does, and therefore, it should be considered fair use. That's the biggest issue for me is how you know art works as a tool of communication, frequently, when people, artist's are working from references, whether you agree with Jack Kuntz' way of working or Andy Warhol's way of working, with using other pop culture subject matter, that's one thing, I think it has to be analyzed on a case by case basis, but at least in the case of working, trying to create images about the leaders, should be fair game for commentary, but it's extremely important, that that be a more free forum for people. That's why I'm fighting the AP in this case. I'm also fighting the AP because the AP came to me and said: *oh, you know, we found out that you used one of our images as a reference for this thing. You owe us money.* And I said: well, I don't think I should have to owe you anything, but I'd be willing to pay what the original licensing fee would've been for the image. And they said: *no we want damages.* And this is through a representative, so it wasn't actually me speaking to them directly, but Brad Grossman was speaking to them I told him what I was willing to do, and then my attorney after that - and I said I'd be willing to pay them for the original licensing fee, but the AP came back and said, no we want damages, my question is what damages are there? The value of the original photograph has been enhanced, it's been licensed several times over just because of this case. It never - it was a situation that had - in which it was taken that its relevance had passed. The Darfur panel with George Clooney in 2006 was most likely not going to be revived in the news and create a market for that piece. So once it became well known with the art piece, and the value of the poster was based on a lot of things. It was based on people feeling strongly about Obama, the fact that it wasn't 2006 that it was 2008 and there was a lot of emotion about him potentially being the next president, there was the following that I have for my art based on my history, as well as the value that even the uninitiated would find in the aesthetics of the art which is well documented on the internet, the response that people had to the art, which also can be further validated by the fact that all of the tributes, all of the knock offs of my Obama image were based on the style of the illustration, not the style of original photograph, including several people who - you know a lot of people based their association with the power of the image on style and even confused other illustrations I did of Obama in that style with the HOPE illustration which is based on a Mannie Garcia

photo. And this is not limited to but very, very thoroughly conveyed by many people saying that it was great that the HOPE image ended up on the cover of TIME magazine. The cover of TIME Magazine that I illustrated was based on a completely different photograph that TIME magazine provided for me. Obama's mouth is open, the blue and the red are on opposite sides of the composition, if you really look at the image, it doesn't look anything like the HOPE image except for the colors and the illustration style. My legal team is making the argument that Barack Obama looks like Barack Obama and there's many, many photographs out there that could have yielded the same results. I happened to choose that one, but it is not original enough to be copyrightable in this context as the basis of an illustration. So, you know, there's a lot of difference things at work here, but anyway, a lot of people - I was asked by the Obama campaign and by TIME and by Creativity to do portraits in the same style of Obama for them, they didn't say hey could you find the photographer who shot the original photo and can we set up a photo shoot that's similar in style to the original photograph? The value I think was mostly based on the illustration style. But the value also, lastly I think, is based on the diligent implementation of the image. I made the posters, spent my own money to put them out there, Yosi Sergant, who was helping put in a lot of time. (Inaudible) my studio to mail posters out to - you know, people were volunteering to go out and give them away or put them up places. Things achieve a critical mass, not just by themselves, so there's a lot to be said about the value of the image, the image becoming symbol because it was very, very, very vigorously promoted into the public. You can play devil's advocate here on any of this stuff-

Interviewer: (Laughs)

SF: -like, because it might be helpful. But, I'm just sort of like telling you all of my thoughts about the case.

Interviewer: Yeah, well. You know, I think the biggest difference between the two images to me was one is clearly an art or design image, and the other one is news a image.

SF: Right. The original image being a news image is I think very relevant, and when you check out some of Mannie Garcia's interviews, Mannie Garcia did not realize it was his photo until a year later even though he acknowledges being familiar with the poster. But he did not realize he was the photographer until someone put his photo side by side with the Obama image - with the Obama poster and said hey look, this is your photo and here's this, and then he said: Well why... People said well why didn't you realize it was your photo? And he said: well I shoot thousands of pictures in a day, when I'm on an assignment, there's no way I can remember all of them. So the next issue that comes up that's relevant to this case to me is: what gives something value? If the argument is that the photo is the most valuable thing, but it took a split second to take and there were thousands of others taken at the same time and the photographer didn't even realize that it was his photo, it's basically saying that, those who have access get to run things. And you know, whether it's Mannie Garcia having a photo pass for a press event or a corporation that can wield its' influence through whatever outlets it has. To me the idea that being able to communicate and having ownership is gonna to be control-proof access is the antithesis of my philosophy which is that, democracy works better when more people can participate. So to diminish the value of what I did, which took far longer than it did for him to take the original photograph, is insulting to me. It's insulting that I recognized, what would be a good starting point to make an image

that might communicate to people, I put it in a new context, I took the time to illustrate it, I took the time to produce posters, to promote the thing on my website, to use my studio. I've used all of my skills and all of my resources to put this thing out there, so the value that's achieved there is based on so much more than the photograph. And so that's a really important factor, I think. And also when the piece that I created was not building on the idea of the photograph. You know, if this had been a photograph that had been composed, and lit, and editorialized with to say that, you know, Obama has the qualities of a leader, I think that that would be a different situation because my poster would then be competing with the intent of the original. But that's not what the situation is.

Interviewer: Now a lot of people have said that The AP is trying to use this case to really make a statement. You know, not just to you obviously, but using this sort of like a landmark case.

SF: Right.

Interviewer: To send a message. How do you interpret that, like, what the AP is doing here?

SF: You know I see what the AP is doing as a way to utilize the fame of the image I created to make sure that it would be a high visibility situation for them. And then, you know, they've had problems with bloggers lifting parts of AP articles and photos for things from the web, which is completely different from what I did. But I think they're confusing these two issues. They're thinking they can use my case as a way to send a warning out to anybody that would ever use anything from the AP without paying for it. But this is not an appropriate situation. They'd be much better off going after a high profile blog that's used an image without licensing it, in an identical - identical to its original form and intent. If the idea is they take a piece of an article and a photograph that went with it and repost that on a blog without paying the AP, and the AP's function is to create stories and photos that serve the story, then a blog is using those things for exactly how they were intended to be used. That would make a lot more sense. What the AP is doing, I think it's - in my case is confusing that situation with a transformative art piece. That's going to I think make it more difficult for them. You know, I respect the role of the AP. I don't - but I don't create a blog that relies on current events content that the AP provides. I'm not competing with the AP in any way. My work serves a completely different purpose.

Interviewer: You know I think you sort of touched on this with the blog thing. The world 'copyright', you know, for so many years everything was sort of like physical/tangible, you know. To copy something you were literally copying it. Now everything's digital, it's so much easier to manipulate things. And you know so it's like it used to be very easy to define a copy. Either it was the same because it was literally copied, or it wasn't. And now it's sort of shades of gray. What do you consider constitutes a copy? Or where exactly would you draw the line between copy and not a copy?

SF: Well I think that even with my own work where other people have made parodies or incorporated aspects of my work in to things that they were doing, I never pursue any of that because references are an important of visual communication. It's when, you know, you can't have parody or satire without context and usually reference. So I only ever pursue legally things that are just direct copies for financially motivated exploitative purposes. I think that also weighs in on the case of the Obama poster because you can track all of my financials from the poster and the poster - I made the poster obviously

not for personal profit. I made it to support a presidential candidate and all of the money was rolled back into the campaign - into the poster campaign, making more materials, or it was donated to the Obama campaign itself, or it was donated to charity -- the ACLU and the No On Prop 8 movement, and also ____ America -- have all gotten money based on the revenues from poster. The- however, I think one of the things AP might be seeing is all the bootleg stuff that's out there that I have absolutely no control over. And they're thinking, well, we want a piece of that action. And I actually feel the same way. I actually wanted to go after some of those bootleggers because I'd rather - if I owned the Obama HOPE image, I'd rather have those people - the money from those bootleggers going back to charities I care about. Have the money going for good, not just to benefit somebody who's just doing it for the money. But, clearly I wasn't just doing it for the money. However, in this case I think that if you're making an image of a political leader, whether it's Warhol's, Nixon, or Vote McGovern, or my image of Obama, the right to make an art piece with a likeness I think is extremely important. Warhol's I'm sure made some money from the McGovern thing. I think that it's fine for him to both make a political statement and to have a piece he spent time and energy on, hours of his life, that he would receive some return for the effort. Just like anyone who works as clerk in a store, or as a dentist, they deserve to be paid for their hours. The analogy I would make is: say you're a painter and you're walking around town with your easel and your paints and you decide, well, the facade of this person's house is nice. I'm going to paint a painting of it, and then you sell that painting. That painting is not going to, in any way, hurt the value of that house. It will be able to be sold for however much it would've been sold for before. Just like the AP photo sold for as much as it had before. However, there is a possibility if that painting becomes very famous, that house becomes very famous through the painting and the house becomes something of greater value because of its fame. And so would that painter, just because they're painting it from a house that they saw on the street, not deserve to be paid for painting that they created? You know, that seems ridiculous to me.

Interviewer: Right. I think I've got to go. (sounds as though the tape recorder was turned off and back on again)

SF: You know I think what's going on now with the way this AP stuff is working if you get back to the house analogy, is that the painter would for the rest of their life whether they sold the painting or made prints of the painting, have to pay the owners of the house or the architect royalties, because they would make the argument that the painting was - that people like the painting because of the house itself or the architecture. To me, there could be many, many reasons why people like the painting. It could be just the style it's painted in, it could be the most banal subject matter painted in a way that's appealing that could make an art piece have value. And I think many artists proved that over the years. And really what's happening here is, my biggest issue, is with how the law is slanted. It's slanted to favor where the corporate money is, not where the expression is. And I think that communication is vital to encourage. And that when things have been transformed that should be fair game. I think that copyright law should only protect things when something is a - is an exact facsimile - it's more or less a bootleg. Because it's a very slippery slope beyond that. People could say well: *I think the style looks kind of like it may have come from this thing*. That could be coincidence or not. The further you get

away from a direct facsimile, the more possibility there is for someone with just a good legal team, to pursue what they consider to be an infringement. I think that has a real chilling effect on creativity.

Interviewer: There's definitely some things in there that I want to...