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 8 THE REPUBLICAN NATIONAL
 COMMITTEE

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 10 **UNITED STATES DISTRICT COURT**
 11 **CENTRAL DISTRICT OF CALIFORNIA**
 12 **WESTERN DIVISION – LOS ANGELES**

13 JACKSON BROWNE, an individual,
 14 Plaintiff,

15 vs.

16 JOHN McCain, an individual; THE
 17 REPUBLICAN NATIONAL COMMITTEE, a
 18 non-profit political organization; THE OHIO
 REPUBLICAN PARTY, a non-profit political
 19 organization
 20 Defendants.

CASE NO. CV-08-05334 RGK (Ex)

**DEFENDANT THE
 REPUBLICAN NATIONAL
 COMMITTEE'S ANSWER TO
 PLAINTIFF JACKSON
 BROWNE'S COMPLAINT**

1 Defendant Republican National Committee (“RNC”) answers the Complaint filed
2 by Jackson Browne (“Plaintiff”) as follows:

3 **INTRODUCTION**

4 1. Defendant RNC is without knowledge or information sufficient to form a belief as
5 to the truth of the allegations in the first four sentences of Paragraph 1 of the Complaint, and
6 therefore denies the same. Defendant RNC denies the allegations in the last sentence of Paragraph
7 1 of the Complaint.

8 2. Defendant RNC denies that the Ohio Republican Party acted as an agent for
9 Defendant RNC, as alleged in Paragraph 2 of the Complaint. As to the last sentence in Paragraph
10 2 of the Complaint, Defendant RNC admits that it did not seek or receive a license from Plaintiff,
11 but Defendant RNC denies that it was required to do so, and Defendant RNC specifically denies
12 having had any involvement in the creation or distribution of the political video that is the subject
13 of this lawsuit. Defendant RNC is without knowledge or information sufficient to form a belief
14 as to the truth of the remaining allegations in Paragraph 2 of the Complaint, and therefore denies
15 the same.

16 3. Defendant RNC is without knowledge or information sufficient to form a belief as
17 to the truth of the allegations in Paragraph 3 of the Complaint, and therefore denies the same.

18 **PARTIES**

19 4. Defendant RNC is without knowledge or information sufficient to form a belief as
20 to the truth of the allegations in Paragraph 4 of the Complaint, and therefore denies the same.

21 5. Defendant RNC admits that Defendant McCain is a United States Senator.
22 Defendant RNC is without knowledge or information sufficient to form a belief as to the truth of
23 the remaining allegations in Paragraph 5 of the Complaint, and therefore denies the same.

24 6. Defendant RNC admits that it is a non-profit political organization with its
25 principal place of business and headquarters in the District of Columbia, as alleged in Paragraph 6
26 of the Complaint.

27 7. Defendant RNC admits the allegations in Paragraph 7 of the Complaint.

28 8. Defendant RNC denies the allegations in Paragraph 8 of the Complaint.

1 9. No response to Paragraph 9 is necessary.

2 **JURISDICTION AND VENUE**

3 10. No response to Paragraph 10 is necessary.

4 11. Defendant RNC denies that Plaintiff has suffered any injury or that Plaintiff is
5 entitled to any relief by means of the allegations set forth in the Complaint. Defendant RNC
6 avers that the remaining allegations in Paragraph 11 regarding jurisdiction constitute legal
7 contentions and/or conclusions to which no response is required.

8 12. Defendant RNC avers that the allegations of Paragraph 12 regarding venue
9 constitute legal contentions and/or conclusions to which no response is required. Defendant RNC
10 denies the remaining allegations in Paragraph 12.

11 **STATEMENT OF FACTS**

12 13. Defendant RNC is without knowledge or information sufficient to form a belief as
13 to the truth of the allegations in Paragraph 13 of the Complaint, and therefore denies the same.

14 14. Defendant RNC is without knowledge or information sufficient to form a belief as
15 to the truth of the allegations in Paragraph 14 of the Complaint, and therefore denies the same.

16 15. Defendant RNC is without knowledge or information sufficient to form a belief as
17 to the truth of the allegations in Paragraph 15 of the Complaint, and therefore denies the same.

18 16. Defendant RNC denies that the Ohio Republican Party acted as an agent for, or in
19 concert with, Defendant RNC at any time relevant to the subject matter of the Complaint, as
20 alleged in the first sentence of Paragraph 16 of the Complaint, and Defendant RNC specifically
21 denies having had any involvement in the creation or distribution of the political video that is the
22 subject of the Complaint. Defendant RNC is without knowledge or information sufficient to form
23 a belief as to the truth of the remaining allegations in the first sentence of Paragraph 16 of the
24 Complaint, and therefore denies the same. Defendant RNC further denies the allegations
25 contained in the second sentence of Paragraph 16. Defendant RNC also denies the allegations
26 contained in the last sentence of Paragraph 16. As to the remaining allegations in Paragraph 16,
27 Defendant RNC is without knowledge or information sufficient to form a belief as to their truth,
28 and therefore denies the same.

1 17. Defendant RNC is without knowledge or information sufficient to form a belief as
2 to the truth of the allegations in Paragraph 17 of the Complaint, and therefore denies the same.

3 18. Defendant RNC admits that it did not seek or obtain Plaintiff's permission to use
4 the Composition, but denies that it was required to obtain a license or seek or receive permission
5 from Plaintiff to use the Composition, as Defendant RNC had no involvement in the creation or
6 distribution of the political video. Defendant RNC is without knowledge or information sufficient
7 to form a belief as to the truth of the allegation that Plaintiff has never allowed the Composition
8 to be used in any commercial, and therefore denies the same. Defendant RNC denies the
9 remaining allegations in Paragraph 18 of the Complaint.

10 **CLAIMS**

11 **FIRST CAUSE OF ACTION**
12 **(Copyright Infringement)**

13 19. Defendant RNC responds to the allegations re-alleged and incorporated by
14 reference in Paragraph 19 of the Complaint in the same manner as set forth hereinabove.

15 20. Defendant RNC is without knowledge or information sufficient to form a belief as
16 to the truth of the allegations in Paragraph 20 of the Complaint, and therefore denies the same.

17 21. Defendant RNC avers that the allegations in Paragraph 21 concerning Plaintiff's
18 allegations of infringement constitute legal contentions and/or conclusions to which no response
19 is required; nonetheless, Defendant RNC denies the same. Defendant RNC admits that it did not
20 seek or receive a license or authorization from Plaintiff, but denies that it was required to do so.
21 Defendant RNC specifically denies having had any involvement in the creation or distribution of
22 the political video.

23 22. Defendant RNC denies the allegations in Paragraph 22.

24 23. Defendant RNC denies the allegations in Paragraph 23.

25 24. Defendant RNC denies the allegations in Paragraph 24.

26 **SECOND CAUSE OF ACTION**
27 **(Vicarious Copyright Infringement)**

28 25. Defendant RNC responds to the allegations re-alleged and incorporated by
reference in Paragraph 25 of the Complaint in the same manner as set forth hereinabove.

- 1 26. Defendant RNC denies the allegations in Paragraph 26.
2 27. Defendant RNC denies the allegations in Paragraph 27.
3 28. Defendant RNC denies the allegations in Paragraph 28.
4 29. Defendant RNC denies the allegations in Paragraph 29.
5 30. Defendant RNC denies the allegations in Paragraph 30.
6 31. Defendant RNC denies the allegations in Paragraph 31.

7 **THIRD CAUSE OF ACTION**
8 **(Federal Trademark Infringement)**

9 32. Defendant RNC responds to the allegations re-alleged and incorporated by reference
10 in Paragraph 32 of the Complaint in the same manner as set forth hereinabove.

11 33. Defendant RNC is without knowledge or information sufficient to form a belief as to
12 the truth of the allegations in Paragraph 33 of the Complaint, and therefore denies the same.

- 13 34. Defendant RNC denies the allegations in Paragraph 34.
14 35. Defendant RNC denies the allegations in Paragraph 35.
15 36. Defendant RNC denies the allegations in Paragraph 36.
16 37. Defendant RNC denies the allegations in Paragraph 37.
17 38. Defendant RNC denies the allegations in Paragraph 38.

18 **FOURTH CAUSE OF ACTION**
19 **(Violation of California Common Law Right of Publicity)**

20 39. Defendant RNC has filed a Notice of Appeal of this Court's Order Denying
21 Defendant RNC's Motion to Strike the Fourth Cause of Action under the California Anti-SLAPP
22 statute, thereby automatically staying further proceeding by this Court on the merits of that Cause
23 of Action. Therefore, no response to Plaintiff's Fourth Cause of Action (Violation of California
24 Common Law Right of Publicity - Paragraphs 39-43 of the Complaint) is required or would be
25 appropriate until Defendant RNC's appeal is resolved. Defendant RNC reserves the right to
26 amend its Answer accordingly upon resolution of the appeal.

27 **DEFENDANT RNC'S FURTHER ANSWERS**
28 **AND AFFIRMATIVE DEFENSES**

1 40. Defendant RNC denies the remaining allegations of the Plaintiff’s Complaint,
2 including Paragraphs 1 – 16 constituting the Prayer for Relief and All Causes of Action, because
3 Plaintiff is not entitled to any of the relief sought by means of the Complaint, under any theory.

4 41. Defendant RNC has not knowingly or intentionally waived any applicable
5 affirmative defenses and reserves the right to assert any other defense that may become available
6 or appear during the discovery proceedings or otherwise in this case. Defendant RNC further
7 reserves the right to amend its answer and/or affirmative defenses accordingly. By setting forth
8 any particular defenses below, Defendant RNC does not thereby assume an affirmative burden of
9 proof as to that defense, but rather relies on applicable law governing which party has the burden
10 of proof and what such burden is.

11 42. In addition to its own affirmative defenses stated below, Defendant RNC hereby
12 adopts and incorporates by reference any affirmative defenses asserted by any other Defendant to
13 this action, to the extent such affirmative defenses applies to Defendant RNC.

14 **First Affirmative Defense**

15 43. Plaintiff has failed to state a claim upon which relief should be granted.

16 **Second Affirmative Defense**

17 44. Plaintiff’s state law claim is preempted by the federal copyright law since the
18 allegedly infringing acts fall within the subject matter of copyright as described in 17 U.S.C. §§
19 102 and 103 and the rights asserted under the state law are equivalent to the rights contained in 17
20 U.S.C. § 106.

21 **Third Affirmative Defense**

22 45. Plaintiff’s federal trademark infringement claim is barred, in whole or in part,
23 since neither Plaintiff’s identity and persona nor the Composition have secondary meaning and do
24 not afford Plaintiff any enforceable trademark.

25 **Fourth Affirmative Defense**

26 46. Plaintiff’s federal trademark infringement claim is barred because even if Plaintiff
27 has an enforceable trademark in Plaintiff’s identity and persona or the Composition, no trademark
28 use has been made of such alleged trademark, as the Commercial neither advertises “goods,

1 services or commercial activities” nor constitutes “commercial advertising or promotion” within
2 the meaning of 15 U.S.C. § 1125(a)(1).

3 **Fifth Affirmative Defense**

4 47. Defendant RNC is not the real party in interest, to the extent that Defendant RNC
5 did not sponsor or pay for the Commercial that is the subject of this litigation, nor did Defendant
6 RNC act in concert with the Ohio Republican Party or the McCain campaign to create the
7 Commercial.

8 **Sixth Affirmative Defense**

9 48. Plaintiff’s claims are barred because Defendant RNC had no right nor ability to
10 supervise the allegedly infringing acts, Defendant RNC had no obvious and direct financial
11 interest in the allegedly infringing acts, and Defendant RNC otherwise took no steps to foster,
12 promote, entice, or encourage infringement.

13 **Seventh Affirmative Defense**

14 49. Defendant RNC has made no profit as a result of the allegedly infringing acts,
15 including any profit under 17 U.S.C. §504(b) that is attributable to the alleged copyrighted
16 Composition.

17 **Eighth Affirmative Defense**

18 50. Plaintiff’s claims of copyright infringement pursuant to 17 U.S.C. § 106(4) are
19 barred with respect to any public performance of the Commercial on television networks, as such
20 performances occurred pursuant to licenses.

21 **Ninth Affirmative Defense**

22 51. Plaintiff’s claims are barred because the use of the Composition in the Commercial
23 is fair use.

24 **Tenth Affirmative Defense**

25 52. Plaintiff’s claims of copyright infringement pursuant to 17 U.S.C. § 106(4) are
26 barred with respect to any public performance of the Commercial on television news programs,
27 blogs, web sites, and other media, as such performances constituted fair use, as set forth in 17
28 U.S.C. § 107.

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Eleventh Affirmative Defense

53. Plaintiff’s claims for copyright infringement pursuant to 17 U.S.C. § 106(4) are barred because the Composition was not publicly performed.

Twelfth Affirmative Defense

54. Plaintiff’s claims are barred because the use of the Composition in the Commercial is constitutionally protected by the First Amendment of the United States Constitution.

Thirteenth Affirmative Defense

55. Plaintiff’s claims for violation of the California Common Law Right of Publicity are barred because the use the Composition in the Commercial is constitutionally protected by the First Amendment inasmuch as it contains significant transformative elements and that the value of the Commercial does not derive primarily from the Plaintiff’s fame.

Fourteenth Affirmative Defense

56. Plaintiff’s claims for violation of the California Common Law Right of Publicity are barred because the use of the Composition in the Commercial is constitutionally protected by the First Amendment as it is non-commercial, political expression.

Fifteenth Affirmative Defense

57. Plaintiff’s alleged copyright registration is invalid or unenforceable due to the failure to comply with the requirements of Title 17 of the United States Code.

Sixteenth Affirmative Defense

58. Plaintiff’s alleged ownership of the alleged federally registered copyright in the Composition is denied.

Seventeenth Affirmative Defense

59. Plaintiff’s claims are barred as Plaintiff lacks standing under 17 U.S.C. §501(b) to bring this action.

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1 **Eighteenth Affirmative Defense**

2 60. Defendant RNC expressly denies that it performed any of the allegedly infringing
3 acts, but any use of copyrighted material by Defendant RNC was *de minimus* and thereby does
4 not constitute an infringement.

5 **Nineteenth Affirmative Defense**

6 61. Defendant RNC expressly denies that it performed any of the allegedly infringing
7 acts, but in the unlikely event that the trier of fact so finds, Defendant RNC's performance of any
8 of the allegedly infringing acts was done with innocent intent.

9 **Twentieth Affirmative Defense**

10 62. Any award of injunctive relief is not reasonable in view of the facts of this case.

11 **Twenty First Affirmative Defense**

12 63. Plaintiff's claims are barred, in whole or in part, because any alleged damages are
13 speculative, uncertain, and impossible to ascertain or allocate.

14 **Twenty Second Affirmative Defense**

15 64. Plaintiff's claims are barred, in whole or in part, due to the absence of any injury
16 or damage as a result of the matters alleged in the Complaint. To the extent that Plaintiff has
17 suffered injury or damage, which Defendant RNC expressly denies, Defendant RNC further avers
18 that any such injury or damage was not by reason of any act or thing done by Defendant RNC.

19 **Twenty Third Affirmative Defense**

20 65. Plaintiff has not suffered any recoverable damages as a result of the allegedly
21 infringing acts of Defendant RNC, including that Plaintiff has not suffered any damages under 17
22 U.S.C. §504(a) as a result of the alleged copyright infringement of Defendant RNC.

23 **Twenty Fourth Affirmative Defense**

24 66. Any damages and profits sought by Plaintiff are limited, in whole or in part,
25 pursuant to 17 U.S.C. §504(b) and exclude deductible expenses and any elements of profit
26 attributable to factors other than the alleged copyrighted Composition.

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1 **Twenty Fifth Affirmative Defense**

2 67. Any statutory damages sought by Plaintiff pursuant to 17 U.S.C. §504(c) are
3 limited, in whole or in part, because any alleged infringement was not committed willfully.

4 **Twenty Sixth Affirmative Defense**

5 68. Any damages suffered by Plaintiff were incurred as a direct and proximate result
6 of Plaintiff's own failure to take all reasonable actions or to use reasonable diligence to properly
7 mitigate such damages.

8 **Twenty Seventh Affirmative Defense**

9 69. Plaintiff's claims are barred by the doctrines of misuse, waiver, estoppel and
10 laches.

11 **Twenty Eighth Affirmative Defense**

12 70. Plaintiff's claims are barred, in whole or in part, on the grounds that the claims are
13 frivolous, unreasonable, not brought in good faith and groundless and, accordingly, Defendant
14 RNC is entitled to recover all costs and attorney's fees incurred herein.

15 **Twenty Ninth Affirmative Defense**

16 71. Upon information and belief, Plaintiff's request for equitable relief should be
17 denied due to Plaintiff's own inequitable conduct, unclean hands, and misrepresentations, as well
18 as because Plaintiff has an adequate remedy at law.

19 **PRAYER FOR RELIEF**

20 WHEREFORE, Defendant respectfully prays as follows:

- 21 1. That the Complaint, at least with respect to Defendant RNC, be dismissed with
22 prejudice;
- 23 2. That Plaintiff takes nothing by the way of this action;
- 24 3. That judgment be entered in favor of Defendant RNC as to all causes of action
25 asserted against it;
- 26 4. That Plaintiff be ordered to pay all of Defendant RNC's costs associated with this
27 action, including attorneys' fees, incurred in defense of the action; and
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5. That this Court grants such other and further relief as may be just and appropriate.

JURY DEMAND

Defendant RNC, pursuant to Federal Rule of Civil Procedure, Rule 38(b), demands a jury trial of all triable issues.

DATED: March 10, 2009

KLEIN, O'NEILL & SINGH, LLP

By /s/ Howard J. Klein
Howard J. Klein
Attorneys for Defendant,
THE REPUBLICAN NATIONAL COMMITTEE

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of the filing to all counsel of record.

/s/ Sang N. Dang
Sang N. Dang