

PUBLIC VERSIONUNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORKSHEPARD FAIREY AND OBEY GIANT
ART, INC.,

Plaintiffs,

v.

THE ASSOCIATED PRESS,

Defendant and Counterclaim
Plaintiff,

v.

SHEPARD FAIREY, OBEY GIANT ART,
INC., OBEY GIANT LLC, STUDIO
NUMBER ONE, INC., and ONE 3 TWO,
INC. (d/b/a OBEY CLOTHING),

Counterclaim Defendants.

ECF

Case No. 09-01123 (AKH)

**DECLARATION OF CHRISTOPHER BRODERS IN SUPPORT OF COUNTERCLAIM
DEFENDANT ONE 3 TWO, INC.'S MOTION FOR SUMMARY JUDGMENT OR, IN
THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT**

I, Christopher Broders declare and state:

1. I am one of the owners and founders of Counterclaim Defendant One 3 Two, Inc. d/b/a Obey Clothing ("One 3 Two). I submit this Declaration in support of One 3 Two's Motion for Summary Judgment. I have personal knowledge of the facts stated herein, and could and would testify competently thereto if called as a witness in this matter.
2. One 3 Two is a clothing company formed in 1999 for the purpose of selling apparel featuring designs created by the artist Shepard Fairey ("Fairey"). One 3 Two sells an extensive line of men's and women's casual clothing and apparel, targeting an urban, 18- to 30-year old demographic. One 3 Two is sold in more than 20 countries worldwide.
3. I have a background in the apparel industry and was involved in the formation of One 3 Two in 1999. At that time, I was familiar with Fairey's artwork and believed that his images and graphic designs would translate well to apparel. I, along with another one of the

other owners of One 3 Two, Steve Mellgren, approached Fairey with a proposal to be his exclusive licensee for apparel. One 3 Two ultimately negotiated an exclusive license agreement with Fairey's company, Obey Giant LLC. Attached hereto as Exhibit "A" is a true and correct copy of the Trademark License Agreement between Obey Giant LLC and One 3 Two, Inc. effective as of June 15, 1999.

4. The licensing agreement has been amended several times during the course of One 3 Two's relationship with Fairey. Attached hereto as Exhibit "B" is a true and correct copy of the Amended and Restated Trademark License Agreement dated June 28, 2006 between Obey Giant LLC and One 3 Two, Inc. Attached hereto as Exhibit "C" is a true and correct copy of the Amendment to the Amended and Restated Trademark License Agreement, also known as Shepard Fairey Trademark License Agreement for Marketing, dated January 2008. Exhibits "B" and "C" governed the relationship between Fairey (through his Company, Obey Giant, LLC) and One 3 Two during 2008 and 2009 when the events in question occurred and shall be referred to herein as the "Exclusive Licensing Agreement."

5. The current owners of One 3 Two are Don Juncal, Eric Singer, Mike Ternosky, Steve Mellgren, Dale Moody, and me. None of us have or have ever had any ownership interest in Fairey's companies, including Counterclaim Defendants Obey Giant Art, Inc.; Obey Giant LLC; Studio Number One, Inc. (the "Fairey Companies"). Similarly, neither Fairey, nor any other person who holds ownership interests in the Fairey Companies, now has, or has ever held, an ownership interest in One 3 Two.

6. Pursuant to the Exclusive License Agreement, Fairey is obligated to provide One 3 Two with a certain number of designs per year, which One 3 Two fashions onto apparel. One 3 Two sells the merchandise and pays Fairey royalties on his work pursuant to their agreement. One 3 Two does not supervise or control the creation of any of Fairey's designs, and did not supervise or control Fairey's creation of the image in question in this lawsuit, the Obama Image.

7. I am aware that Fairey created the Obama Image in late January 2008, primarily as a result of my review of press reports at the time and through conversations with others at

One 3 Two. One 3 Two was not involved in Fairey's creation or production of the Obama Image, and did not even obtain a copy of the Obama Image until weeks later, in late February 2008.

8. One 3 Two typically produces four clothing lines per year. In addition to these clothing lines, we will occasionally undertake side projects, called "Obey Awareness" projects, to highlight and support charitable causes that we believe would be of interest to our customers. For instance, we have sold merchandise to support Darfur, and the victims of the Haitian earthquake in early 2009. The Obey Awareness merchandise is sold separately from our normal product lines, with all profits donated to the charity in question, and I am primarily responsible for overseeing these special projects.

9. As originally conceived, One 3 Two's use of the Obama Image was to be akin to the Obey Awareness Projects, and I therefore had primary responsibility for overseeing the use of any profits earned therefrom. Accordingly, on February 28, 2008, I emailed Fairey to request the vector art that would be necessary for One 3 Two's design team to place the Obama Image on apparel. Attached hereto as Exhibit "D" is a true and correct copy of an email chain dated February 28, 2008 between me and Fairey's companies in which I requested and received the vector art for the Obama Image. Our design team, under my supervision, designed T-shirts featuring the Obama Image.

10. In my supervisory role over the Obama Merchandise, I would have received or reviewed emails from Fairey regarding the Obama Image and would have known if Fairey had provided One 3 Two with a copy of the Garcia photograph. Fairey never provided to One 3 Two a copy of the Garcia photograph that he used as a reference, and One 3 Two would not otherwise have had access to that image. Indeed, prior to this litigation, neither I nor anyone else at One 3 Two had any knowledge of which photograph Fairey used as a reference in creating the Obama Image. In addition, Fairey never told me or anyone else at One 3 Two that he stripped copyright management information from the photograph he used as a reference to create the Obama Image, and we would not have the ability to tell whether he had done so based on the art that we received from him. In short, prior to this litigation, One 3 Two had no

information regarding what actions Fairey took to create the Obama Image from the Garcia photograph.

11. After receiving the Obama Image from Fairey, One 3 Two created a number of different apparel styles featuring the Obama Image (the "Obama Merchandise"), and did not make any changes to the Obama Image aside from subtle changes relating to sizing and typography. Some of these apparel designs displayed a black and white version of the Obama Image; some others included text beneath the Obama Image; and others displayed the Obama Image less prominently with additional design features. True and correct copies of examples of these different designs are attached hereto as Exhibits "E," "F," and "G." In addition, One 3 Two placed the designs on different "bodies," or types of apparel, such as T-shirts, hooded sweatshirts, and tank tops. One 3 Two began selling the Obama Merchandise in April 2008.

12. Although One 3 Two sold some of the Obama Merchandise, One 3 Two did not seek to profit from the use of the Obama Image or create the appearance that One 3 Two was trying to make money based on the popularity of the then-Presidential candidate Barack Obama. Accordingly, the owners of One 3 Two decided to donate the profits earned on the Obama Merchandise to support the Obama campaign in a manner that would be akin to our Obey Awareness projects.

13. At some point after we made this decision, we learned that campaign finance laws prohibited One 3 Two from donating all of the monetary profits to President Obama's campaign. Accordingly, we had to figure out other ways to use the profits to support President Obama's campaign. For example, we (1) created window installations using the Obama Image; (2) purchased advertisements in magazines featuring the Obama Image; (3) supplied funds for the creation of posters and stickers featuring the Obama Image; and (4) gave away some of the Obama Merchandise at no cost. Between March and November 2008, according to One 3 Two's internal accounting records, One 3 Two donated goods valued at least [REDACTED] to efforts to promote Obama's bid for the presidency.

14. Neither I nor anyone else at One 3 Two was aware that Fairey initially misrepresented which photograph he used as a reference in this litigation, or that he destroyed evidence in an attempt to conceal which photograph he used. I was the first principal of One 3 Two to find out about Fairey's misconduct, and he informed me of that fact at a meeting a day or two before he issued a press release to that effect on October 16, 2009.

I declare under penalty of perjury and the laws of the United States that the foregoing is true and correct to the best of my knowledge and that this Declaration was executed on January 4, 2011, at Irvine, California.


CHRISTOPHER BRODERS