

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHEPARD 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)

MEMORANDUM OF LAW IN SUPPORT OF COUNTERCLAIM DEFENDANT ONE 3 TWO, INC.'S MOTION TO REDACT CERTAIN CONFIDENTIAL PORTIONS OF ITS SUMMARY JUDGMENT PAPERS FOR PURPOSES OF THE PUBLIC FILE

I. INTRODUCTION

Counterclaim Defendant One 3 Two, Inc. d/b/a Obey Clothing (“One 3 Two”) hereby submits this memorandum of law in support of its Motion to Redact Certain Confidential Portions of One 3 Two’s Summary Judgment Papers for Purposes of the Public File, and to File a Non-redacted Version of Those Papers Under Seal (“Motion to Redact”). A protective order entered into by the parties and endorsed by this Court requires that material designated as “Confidential” be filed under seal. Pursuant to the procedures set forth in that protective order, and, after meeting and conferring with counsel for Counterclaim Plaintiff the Associated Press (“AP”), One 3 Two sought to manually file a non-redacted version of its summary judgment

papers under seal and electronically filed a public, redacted version of its summary judgment papers. Pursuant to Rule 4.A. of this Court's Individual Rules, One 3 Two hereby requests that the Court accept One 3 Two's proposed redactions and deem the documents submitted by One 3 Two to the Clerk under seal to be a sealed filing. The proposed redactions were made pursuant to the protective order entered into by the parties and are narrowly tailored to protect confidential, proprietary, and personal information.

II. THE STIPULATED AMENDED PROTECTIVE ORDER REQUIRES CONFIDENTIAL INFORMATION TO BE REDACTED

On April 12, 2010, this Court endorsed the Stipulated Amended Protective Order (Docket No. 127) entered into to by the parties in this case (the "Protective Order"). The Protective Order provides that certain material may be designated by the parties as "Confidential Information." Protective Order, ¶ 2. "Confidential Information" may include, among other things, documents or deposition transcripts containing "confidential, personal, privileged or proprietary information." *Id.* The Protective Order sets forth a procedure for filing Confidential Information and requires the parties to redact Confidential Information included in public filings and to simultaneously file a non-redacted version with a request that it be treated as a "Sealed Document." *Id.*, ¶ 19.

In accordance with the terms of the Protective Order, One 3 Two sought to file its summary judgment papers under seal on January 7, 2011. Later that day, One 3 Two electronically filed a redacted, public version of its summary judgment papers in which it redacted a limited amount of material that had been designated as "Confidential" or referenced the fact of the settlement between the AP and Shepard Fairey and his related entities ("Fairey"),

which One 3 Two understood was not yet public.¹ Declaration of Jeanne A. Fugate (“Fugate Decl.”), ¶ 2. Prior to filing its redacted papers, counsel for One 3 Two met and conferred with counsel for the AP and reached an agreement regarding what information contained in the parties’ memoranda of law and statements pursuant to Local Rule 56.1 should be redacted pursuant to the terms of the Protective Order. Fugate Decl., ¶ 3. One 3 Two requests that the redacted version of its summary judgment papers electronically filed on January 7, 2011 be accepted as the public version.

III. THE REDACTION OF THE CONFIDENTIAL INFORMATION AT ISSUE IS AUTHORIZED BY FEDERAL LAW

Although there is a presumption of public access to judicial documents, Federal Rule of Civil Procedure 26(c) authorizes District Courts, upon a showing of good cause, to require that “a deposition be sealed” or “that trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way.” Fed. R. Civ. P. 26(c)(1)(F) and 26(c)(1)(G). In addition, this Court’s Individual Rules authorize sealing when “it is essential to preserve higher values and is narrowly tailored to serve that interest.” Individual Rule 4.A.

Here, One 3 Two has redacted information designated as “Confidential” pursuant to the terms of the Protective Order. The majority of One 3 Two’s redactions are limited to One 3 Two’s confidential financial information. Information regarding One 3 Two’s revenues, costs,

¹ After One 3 Two filed its Motion for Summary Judgment, or, in the Alternative, Partial Summary Judgment (the “Motion for Summary Judgment”), the AP and Fairey made public the fact of the settlement. Because the fact of the settlement was confidential at the time One 3 Two filed its Motion for Summary Judgment, One 3 Two’s proposed redactions include information regarding the settlement. *See* Fugate Decl., ¶ 2. Accordingly, One 3 Two will file a revised public version of its summary judgment papers which eliminates the redactions relating to the settlement if the Court deems it appropriate.

and profits is confidential proprietary information that could cause substantial harm to One 3 Two's business if made public. Declaration of Regan Don Juncal ("Juncal Decl."), ¶ 3. Accordingly, One 3 Two requests that this financial information, which is contained in One 3 Two's memorandum of law in support of its motion for summary judgment, statement pursuant to Local Rule 56.1, and the Declaration of Christopher Broders, be sealed. *See Bergen Brunswick Corp. v. Ivax Corp.*, No. 97 CIV. 2003, 1998 WL 113976, at *3 (S.D.N.Y. March 12, 1998) (recognizing that "[p]otential damage from the release of sensitive business information" is "a ground for denying access to court documents").

One 3 Two has also redacted (1) an excerpt from Mr. Juncal's deposition in which he reveals personal information about his wife; (2) the highest amount the AP has ever charged for a licensing fee; and (3) the amount of profits the AP asserts that Fairey earned in indirect profits. The information about Mr. Juncal's wife is the personal information of a third-party and should not be made public. Juncal Decl., ¶ 5; *see, e.g., Online Payment Solutions Inc. v. Svenska Handelsbanken AB*, 638 F. Supp. 2d 375, 384, n.4 (S.D.N.Y. 2009) (sealing documents which revealed personal information of non-parties). Regarding the financial information of the AP and Fairey, because this information was designated by the AP and Fairey as "Confidential," One 3 Two requests that it be sealed.

One 3 Two also requests that the following exhibits, which have all been designated as "Confidential," be sealed: Exhibits A-C (proprietary licensing agreements between One 3 Two and Obey Giant, LLC), Exhibit H (One 3 Two's "Look Book" from 2010), Exhibits N-S (deposition transcripts referring to financial and proprietary information),² and Exhibits T-V

² Exhibit S, the deposition transcript of Mannie Garcia, does not refer to One 3 Two's proprietary information, but was submitted under seal pursuant to the terms of the Protective Order. Fugate Decl., ¶ 4.

(expert reports also referring to financial and proprietary information). Exhibits A-C, N-R and T all contain One 3 Two's confidential financial and/or proprietary information and should not be made public on this basis. *See* Juncal Decl., ¶¶ 3-4. In addition, certain of these exhibits were designated as "Confidential" by other parties and One 3 Two requests that they be filed under seal pursuant to the Protective Order. *See* Exhibits D,³ O, and R-V. One 3 Two therefore requests that the Court permit One 3 Two to file all of the aforementioned exhibits under seal. *See Gelb v. American Tel. & Tel. Co.*, 813 F. Supp. 1022, 1035 (S.D.N.Y. 1993) (granting motion to seal exhibits based on their potential to cause commercial harm pursuant to Rule 26(c)); *see also In re September 11 Litigation*, 723 F. Supp. 2d. 526, 533 (S.D.N.Y. 2010) (holding that certain "[c]onfidential documents exchanged in the course of discovery, negotiation, and mediation" should remain under seal).

³ Fairey also produced part of this email chain and designated this email as "Confidential." *Fugate Decl.*, ¶ 5.

IV. CONCLUSION

Based on the foregoing, One 3 Two respectfully requests that its Motion to Redact be granted and that the redacted version of its summary judgment papers electronically filed on January 7, 2011 be accepted as the public version of this filing and that the summary judgment papers submitted to the Clerk under seal be deemed a sealed filing.

Dated: Los Angeles, California

Respectfully submitted,

January 13, 2011

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