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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, et al.,

Counterclaim Defendants

Case No.: 09 CIV 01123 (AKH)

ECF CASE

**THE ASSOCIATED PRESS'S
RESPONSE TO COUNTERCLAIM
DEFENDANT OBEY
CLOTHING'S STATEMENT OF
UNDISPUTED FACTS AND
COUNTER-STATEMENT OF
MATERIAL FACTS**

CONFIDENTIAL

FILED UNDER SEAL

Pursuant to Rule 56.1 (b) and (c) of the Local Rules of the United States District Court for the Southern District of New York and Rule 56 of the Federal Rules of Civil Procedure, Defendant and Counterclaim Plaintiff the Associated Press ("AP"), by and through its counsel, respectfully submits the following additional material facts and response to the Statement of

Undisputed Facts of Counterclaim Defendant One 3 Two, Inc., d/b/a/ Obey Clothing (“Obey Clothing”), in support of its partial motion for summary judgment.

The AP’s Specific Responses to Obey Clothing’s Rule 56.1 Statement

1. *One 3 Two has a contractual relationship with the artist Shepard Fairey whereby One 3 Two is the exclusive licensee for apparel of Fairey’s company, Obey Giant, LLC (“Obey Giant”). [Declaration of Christopher Broders (“Broders Decl.”), ¶¶ 3-4, Exs. B & C; Ex. P (Deposition of Christopher Broders (“Broders Depo.”), at 31:2-7); Ex. O (Deposition of Shepard Fairey (“Fairey Depo.”), at 54:15-56:6).]*

Undisputed. But the AP adds, for clarification, that Obey Clothing has an exclusive trademark licensing agreement with Obey Giant LLC 81% of which is owned by Shepard Fairey and his wife, Amanda Fairey, with Justin McCormack, a business partner, owning the rest for use of the “Obey” trade name and “Obey” logo on apparel (the “Exclusive License Agreement”). (Docket # 158, Declaration of Brendan Kehoe dated January 6, 2011, (“Kehoe Decl.”) ¶¶ 13, 15, Exs. 12 & 14.) The “Obey” trade name and logo are registered trademarks owned by Mr. Fairey and Obey Giant LLC. (Id.)

2. *Obey Giant and One 3 Two negotiated a written exclusive license agreement that has been amended several times. [Broders Decl., ¶¶ 2-4, Exs. A, B & C.]*

Disputed. Based on the two versions of the Exclusive License Agreement and one rider-amendment thereto that Obey Clothing has produced in this litigation (Docket # 151-2, Declaration of Christopher Broders dated January 4, 2011, (“Broders Decl.”) ¶¶ 4, 5, Exs. A, B, and C), for the purpose of this motion, the AP believes that the Exclusive License Agreement has been amended twice. In any event, the AP does not believe that this fact is material.

3. *Neither Shepard Fairey, nor any other person who holds an interest in the companies that manage his work, now has or has ever held an interest in One 3 Two. [Broders*

Decl., ¶ 5; *Ex. N (Deposition of Regan Donald Juncal (“Juncal Depo.”), at 43:21-25); Ex. P (Broders Depo., at 29:9-11); Ex. O (Fairey Depo., at 55:7-12).*]

Disputed. The phrase “holds an interest in” or “held an interest in” is vague and ambiguous. For the purpose of this motion, the AP admits that neither Mr. Fairey, Mrs. Fairey, nor Justin McCormack, the Faireys’ business partner in Obey Giant LLC, holds, or has held, a formal ownership interest in Obey Clothing. But, as Obey Clothing itself has stated, Mr. Fairey and his company Obey Giant LLC “ostensibly have an ownership position in [Obey Clothing’s] business” based on the terms of the Exclusive License Agreement, which provide that Obey Giant LLC earns royalties of up to [REDACTED] of net sales of all merchandise sold by Obey Clothing. (Declaration of Brendan T. Kehoe dated January 26, 2011 (“Kehoe Opp. Decl.”), ¶ 2, Ex. 74 (OTT 0017176-79 (OTT 017177).))

4. *One 3 Two is owned by Christopher Broders, R. Donald Juncal, Eric Singer, Mike Ternosky, Steve Mellgren and Dale Moody. [Broders Decl., ¶ 5.]*

Undisputed. But the AP adds, to clarify, that the owners of Obey Clothing hold the following approximate ownership interests: Mr. Juncal, 33%; Mr. Broders, 15%; Mr. Singer, 15%; M. Ternosky, 4%; S. Mellgren, 29%; and Dale Moody, 5%. (Kehoe Decl. ¶ 19, Ex. 18 (42:3-23).)

5. *None of the owners of One 3 Two has any financial stake in Shepard Fairey’s companies. [Broders Decl., ¶ 5; Ex. P (Broders Depo., at 27:7-9).]*

Disputed. The phrase “financial stake” is vague and ambiguous. Obey Clothing has an indirect financial stake in Shepard Fairey’s companies by virtue of the Exclusive License Agreement. Specifically, Obey Clothing’s merchandise and accessories all bear the “Obey” trade name or logo or both. (Kehoe Decl. ¶ 15, Ex. 14.) Mr. Fairey’s company Obey Giant

LLC owns the trademark in the “Obey” trade name and logo, which, as discussed in the AP’s response to paragraph 1, Obey Giant LLC exclusively licenses to Obey Clothing for use on apparel. (*Id.*) Similarly, Mr. Fairey’s company Obey Giant Art, Inc. markets and sells, through obeygiant.com, Mr. Fairey’s graphic designs and related merchandise, including screen prints and posters, which bear the same “Obey” trademarks. (Kehoe Decl. ¶¶ 13,14 , Exs. 12 (72:19-73:24), 13.) The Exclusive License Agreement requires Mr. Fairey to provide Obey Clothing with 15 to 20 of his graphic designs per season, or quarter, for its use on apparel. (Kehoe Decl. ¶ 15, Ex. 14 (Section 9.1).) To fulfill this requirement, Mr. Fairey frequently provides Obey Clothing with graphic designs that Obey Giant Art, Inc. has previously marketed and sold, recent examples of which are pictured below:



Mr. Fairey’s
“Eye Alert”



Obey Clothing Tee



Mr. Fairey’s
“Your Eyes Here”



Obey Clothing Tee



Mr. Fairey’s
“Global Warning”



Obey Clothing Tee



Mr. Fairey’s
“Operation Oil Freedom”



Obey Clothing Tee

(Kehoe Decl. ¶¶ 25, 26, 38, and 39, Exs. 24, 25, 37 and 38; Kehoe Opp. Decl. ¶ 3, Ex. 75 (subpages from Obey Giant Art, Inc.'s website and Obey Clothing's website (last visited January 25, 2011): <http://obeygiant.com/prints/eye-alert-cream>; <http://shop.obeyclothing.com/p-2571-eye-alert-heather-tee.aspx>; <http://obeygiant.com/prints/your-eyes-here>; <http://shop.obeyclothing.com/p-2612-your-eyes-here-basic-tee.aspx>; <http://obeygiant.com/prints/global-warning>; <http://obeygiant.com/prints/operation-oil-freedom-gold>; <http://shop.obeyclothing.com/p-2227-global-warming-everyday-crew-neck-tee.aspx>.)

Thus, Obey Giant LLC, Obey Giant Art, Inc., and Obey Clothing collectively market and promote the “Obey” brand, and each play a role in the management and success of this brand.

6. *One 3 Two is now based in Irvine California, and was previously based in Santa Ana, California. [Declaration of Regan Donald Juncal (“Juncal Decl.”), ¶ 2.]*

Undisputed.

7. *One 3 Two sells clothing and other merchandise and, pursuant to its license agreement with Obey Giant, pays royalties to Fairey. [Broders Decl., ¶¶ 2 & 6, Ex. B, ¶ 6; Ex. O (Fairey Depo. at 55:10-12).]*

Undisputed. But the AP adds, for clarification, that, pursuant to the terms of the Exclusive License Agreement, each piece of apparel or merchandise sold by Obey Clothing bears the “Obey” trade name or logo or both. (Kehoe Decl. ¶ 15, Ex. 14.) On each such item, Obey Clothing pays a tiered royalty of up to [REDACTED] of net sales to Obey Giant LLC, which then distributes company profits to its three owners, Mr. and Mrs. Fairey and Mr. McCormack. (Kehoe Decl. ¶ 15, Ex. 14; ¶ 55, Ex. 54 (Obey Giant LLC's check register 2002 through 2010).)

8. *One 3 Two does not supervise or control the creation of any of Shepard Fairey's designs, and did not supervise or control Shepard Fairey's creation of the image at issue in this lawsuit. [Broders Decl., ¶ 6.]*

Disputed. Obey Clothing has the right to review graphics submitted to it by Mr. Fairey and his companies and to decline to use any such graphic if the company so chooses.

Specifically, the reverse-indemnification provision in the Exclusive License Agreement not only states that Mr. Fairey's art at least "occasionally" incorporates "protectable intellectual property" of third parties, but also provides that Obey Clothing can decide, at its own risk, to use that art on apparel and merchandise. (Kehoe Decl. ¶ 15, Ex. 14 (Section 1.8).) Consistent with that provision, in October 2007, Mr. McCormack, part owner in Obey Giant LLC, explicitly warned Obey Clothing that "not all of Shepard's art can translate to apparel" and that Obey Clothing needs to use its own "best / educated judgement [sic]" in deciding which graphics to use.

(Kehoe Opp. Decl. ¶ 4; Ex. 76 (D. Juncal Dep. Ex. 35).) Obey Clothing has done exactly that in the past by rejecting problematic images submitted to it by Mr. Fairey and his companies.

(Kehoe Opp. Decl. ¶ 5; Ex. 77 (D. Juncal Dep. Exs. 39 and 40) ¶ 6; Ex. 78 (D. Juncal Dep. (Aug. 26, 2010) 326:21-329:19).) In the case of the Obama Image, Mr. Juncal expressly acknowledged, in March 2008, that Obey Clothing's use of the image on apparel could result in claims from the photographer. (Kehoe Decl. ¶ 63, Ex. 62.) Nevertheless, despite this concern and the option to choose not to use the image, Obey Clothing engaged in what it admits was the substantial, for-profit sale and distribution of the Obama Image on t-shirts, hooded sweatshirts, and other items. (Kehoe Decl. ¶ 64, Ex. 63; Docket # 159, Memorandum of Law in Support of Obey Clothing's Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment 8.)

9. *While One 3 Two was originally formed primarily to create t-shirts and sweatshirts bearing Shepard Fairey's graphics, from its very first season onward its products have also included substantial sportswear lines that do not include Fairey's designs and its products have expanded over time. [Juncal Decl., ¶ 3; Broders Decl., ¶ 2; Ex. N (Juncal Depo. at 43:18-20).]*

Disputed. The terms “substantial” and “sportswear” are vague and ambiguous as are the phrases “Fairey’s graphics,” and “Fairey’s designs.” The AP disputes that Obey Clothing’s products have “included substantial sportswear lines that do not include Fairey’s designs.” Mr. Fairey designed the graphic “Obey” logo. (Kehoe Decl. ¶ 12, Ex. 11.) As such, the “Obey” logo constitutes one of “Fairey’s designs.” Pursuant to the terms of the Exclusive License Agreement, each piece of apparel or merchandise sold by Obey Clothing bears the “Obey” trade name or logo or both. (Kehoe Decl. ¶15, Ex. 14.) Further, Obey Clothing has not produced, let alone cited, any evidence establishing what percentage of Obey Clothing’s apparel does not or did not feature one of Mr. Fairey’s designs and/or the “Obey” logo. In fact, Obey Clothing has acknowledged that Mr. Fairey’s graphic designs are central to the parties’ Exclusive License Agreement. For instance, in a September 14, 2008 letter to the Faireys and Mr. McCormack, as owners of Obey Giant LLC, Obey Clothing’s principals requested that Obey Giant LLC extend the parties’ trademark licensing agreement for up to 35 years, stating as follows:

Shepard and his graphics are synonymous. Shepard’s notoriety is as an artist, and his graphics are the single biggest asset we have on our end of the contract. Please do not take this the wrong way we know he is more than just a graphic artist but his art was the crux of the original agreement.

(Kehoe Opp. Decl. ¶ 2; Ex. 74 (OTT 0017176-79).) Additionally, according to Mr. Juncal, Obey Clothing’s largest owner, Mr. Fairey and his design firm provide approximately 90 percent of the graphic designs featured on Obey Clothing’s apparel. (Kehoe Opp. Decl. ¶ 7; Ex. 79 (D.

Juncal Dep. (Mar. 23, 2010) 45:6-22). Pictured below are examples of Obey Clothing apparel items that feature Mr. Fairey's designs and that are currently for sale online:



(Kehoe Opp. Decl. ¶ 8; Ex. 80 (subpages from Obey Giant Art, Inc.'s website, Obey Clothing's website, and the website for Obey Clothing's UK affiliate, Obey Clothing UK, as linked from obeyclothing.com (last visited January 25, 2011): <http://shop.obeyclothing.com/p-2612-your-eyes-here-basic-tee.aspx>; <http://shop.obeyclothing.com/p-2571-eye-alert-heather-tee.aspx>; <http://shop.obeyclothing.com/p-2282-og-face-sweatshirt.aspx>; http://shop.obeyclothing.co.uk/products/43/446/star_basic_t-shirt/; http://shop.obeyclothing.co.uk/products/32/171/peeking_boatneck_t/.)

10. *Between 2008 and the present, One 3 Two has had a broad product line that includes accessories, hats, handbags, jewelry and sportswear items. [Juncal Decl., ¶ 3, Ex. H.]*

Disputed. The terms “broad” and “sportswear” are vague and ambiguous. Further, Obey Clothing's “Look Book” for 2010 nowhere describes or depicts the product lines that Obey Clothing had in 2008 and 2009. Further, according to its own documents, in both of those years t-shirts, tank tops, and sweatshirts were overwhelmingly Obey Clothing's primary apparel items on a percent-of-revenue basis. (Kehoe Opp. Decl. ¶ 9; Ex. 81 (“Revenue Analysis” tab from OTT 0028371-418) ¶ 10; Ex. 82 (“Revenue Analysis” tab from OTT 0028300-380).) In contrast, Obey Clothing's listed accessories (including hats, handbags, and jewelry) contributed only a *de minimis* amount in these years. (*Id.*) And, importantly, Obey Clothing's accessories,

including bags and jewelry, use the “Obey” logo and often feature Mr. Fairey’s designs in addition to bearing the “Obey” trade name; pictured below are examples currently for sale online:



(Kehoe Opp. Decl. ¶ 11; Ex. 83 (subpages from Obey Clothing’s website and Obey Clothing UK’s website (last visited January 25, 2011): <http://shop.obeyclothing.com/p-2656-eye-alert-bag.aspx>; http://shop.obeyclothing.co.uk/products/16/193/peeking_tote_bag/; <http://shop.obeyclothing.com/p-2751-mujer-tote-bag.aspx>; http://shop.obeyclothing.co.uk/products/30/185/death_disco_necklace/; <http://shop.obeyclothing.com/p-2651-zapatista-stencil-scarf.aspx>.)

11. *The design at issue in this litigation, referenced as the “Obama Image,” was created by Shepard Fairey in January 2008. [Exs. I, J, & O (Fairey Depo. at 194-195); Amended Complaint for Declaratory Judgment and Injunctive Relief filed on November 13, 2009, ¶¶ 13 & 19.]*

Undisputed.

12. *Fairey used a photograph taken by photographer Mannie Garcia, and owned by the AP (the “Garcia Photo”), as a visual reference to create the Obama Image. [Exs. K & O (Fairey Depo. at 30:3-21, 31:8-23).]*

Disputed. Mr. Fairey downloaded a copy of Mr. Garcia’s photographic portrait of then-Senator Obama (the “Obama Photo”) through Google Images onto his computer, copying the

image in its entirety. (Kehoe Decl. ¶¶ 11, 17, 49, Exs. 10 (46:22-48:25; 78:22-80:15; 231:10-236:25), 16-3 through 16-7 (S. Fairey Dep. Ex. 30), 48.) The Obama Photo was the source image for Mr. Fairey's Obama Image and not merely a visual reference. (Docket # 163, Declaration of Robyn C. Crowther dated January 5, 2011, ("Crowther Decl.") ¶ 15, Ex. V (Dahlberg Rpt. ¶¶ 51-53).) Mr. Fairey copied the Obama Photo of then-Senator Obama (the "Obama Photo") nearly verbatim, right down to the twinkle that Mr. Garcia captured in Mr. Obama's eye. (Kehoe Decl. ¶¶ 44, 45, 49, Exs. 43 (64:10-13), 44 (109:3-110:3), 48; Crowther Decl. ¶ , Ex. V (Dahlberg Rpt. ¶¶ 43, 44).) To do so, Mr. Fairey digitally manipulated the Obama Photo on his computer using the Adobe Illustrator and Adobe Photoshop programs. (Kehoe Decl. ¶¶ 11, 17, 49, Exs. 10 (46:22-48:25; 78:22-80:15; 231:10-236:25), 16-3 through 16-7 (S. Fairey Dep. Ex. 30), 48.) Accordingly, the Obama Photo was, quite literally, the source of the Obama Image. (Crowther Decl. ¶ 15, Ex. V (Dahlberg Rpt. ¶ 53).)

13. *One 3 Two first received a copy of the Obama Image for the purpose of placing it on apparel on or about February 28, 2008. [Broders Decl., ¶ 9, Ex. D; Ex. O (Fairey Depo. at 638:4-17).]*

Undisputed.

14. *One 3 Two never received a copy of or otherwise accessed the Garcia Photo. [Broders Decl., ¶ 10; Juncal Decl., ¶ 6; Ex. N (Juncal Depo. at 66:25-67:10).]*

Undisputed. But the AP adds, to clarify, that, prior to selling the t-shirts, hooded sweatshirts and other products bearing the Obama Image ("Obama Merchandise"), Obey Clothing knew that the Obama Image was based on a photograph that Mr. Fairey did not have permission to use. Specifically, in a March 25, 2008 e-mail, Mr. Juncal, Obey Clothing's largest owner, expressly acknowledged that because the company did not know who the photographer

of the source photograph was, Obey Clothing's sale of merchandise bearing the Obama Image use of the Obama Image result in legal claims. (Kehoe Decl. ¶ 63, Ex. 62.) In pertinent part, Mr. Juncal's e-mail states the following:

Another issue is since we do not know who the photographer is that took the photo you used for your art, and Olivia [Perches at Obey Giant Art, Inc.] does not think we could get a full release to sell and use the image to retailers from Obama's camp. Olivia's concerned, and I agree, that if we sold it to Urban and the photographer came at Urban, that could open other legal issues.

(Id.)

Further, after Mr. Juncal's March 2008 e-mail, Obey Clothing's principals did not make any effort to identify who made the source image or who owned the copyright in the source image. (Kehoe Decl. ¶¶ 19, 35, Exs. 18 (105:2-18), 34 (119:4-120:9).)

15. *One 3 Two produced and/or sold t-shirts and other merchandise with the Obama Image (the "Obama Merchandise") without making changes to the Obama Image aside from subtle alterations of sizing and typography. [Broders Decl., ¶ 11; Ex. N (Juncal Depo. at 88:9-22); Ex. P (Broders Depo. at 45:5-18).]*

Disputed. Obey Clothing sold apparel featuring the Obama Image without certain elements that appeared in the poster Mr. Fairey made using the image. For example, Obey Clothing sold apparel featuring the Obama Image without the words "Progress" or "Hope," or any text whatsoever. (Kehoe Decl. ¶¶ 65, 67, Exs. 64, and 66.) Obey Clothing also sold apparel featuring the Obama Image in black and white, without the red-white-and-blue color scheme Mr. Fairey used, and without the words "Progress" or "Hope" or any text whatsoever. (Kehoe Decl. ¶¶ 65, 68, Exs. 64, 67.)

16. *One 3 Two first began to sell merchandise with the Obama Image on it in April 2008. [Broders Decl., ¶ 11.]*

Undisputed. But the AP adds, to clarify, that Mr. Fairey released the Obama Image publicly on January 25, 2008, and began to sell posters bearing the image on January 30, 2008, through Obey Giant Art, Inc.'s website, obeygiant.com. (Kehoe Decl. ¶ 51, Ex. 50.) Upper Playground, a San Francisco-based clothing company, began selling t-shirts bearing the Obama Image on or around February 25, 2008. (Kehoe Opp. Decl. ¶ 12, Ex. 84 (OTT 0011185).) On February 26, 2008, when Obey Clothing discovered that Mr. Fairey had allowed Upper Playground to use the Obama Image on apparel, Brent Larsen of Obey Clothing assured Mr. Broders that "people will think it's an Obey tee anyways." (Kehoe Opp. Decl. ¶ 12, Ex. 84 (OTT 0011185).) Shortly thereafter, on March 7, 2008, Obey Clothing began shipping promotional t-shirts bearing the Obama Image. (Kehoe Decl. ¶ 64, Ex. 63.)

17. *There is no evidence that Shepard Fairey ever told One 3 Two that he had stripped copyright management information from the photograph that he used as a visual reference to create the Obama Image and One 3 Two is not aware of any such conduct. [Juncal Decl., ¶ 6; Broders Decl., ¶ 10.]*

Disputed. As an initial matter, as discussed in the AP's response to Obey Clothing's paragraph 12, the Obama Photo was the source image for Mr. Fairey's Obama Image and not merely a visual reference. (Crowther Decl. ¶ , Ex. V (Dahlberg Rpt. ¶¶ 51-53).) Further, as discussed in AP's response to Obey Clothing's paragraph 14, and as demonstrated by Mr. Juncal March 2008 e-mail to Mr. Fairey and others, Obey Clothing knew that the Obama Image was based on a photograph that Mr. Fairey did not have permission to use. (Kehoe Decl. ¶ 63, Ex. 62.) Significantly, Mr. Juncal did not produce a copy of this e-mail, as all of his e-mail prior to April 23, 2008, were allegedly lost and never recovered when he changed computers and his old laptop was "retire[d]." (Kehoe Opp. Decl. ¶ 13, Ex. 85 (Obey Clothing's Supplemental

Responses and Objection to the AP's First Set of Requests for Production, dated March 12, 2010, at 4.) Therefore, it is impossible to tell whether he communicated with anyone regarding copyright management information in the Obama Photo prior to that date. Also, after Mr. Juncal acknowledged the legal issues surrounding the Obama Image in March 2008, Obey Clothing's principals did not make any effort to identify who made the source image or who owned the copyright in the source image. (Kehoe Decl. ¶¶ 19, 35, Exs. 18 (105:2-18), 34 (119:4-120:9).)

18. *Prior to this litigation, One 3 Two did not know which specific photograph Fairey referenced to create the Obama Image. [Juncal Decl., ¶ 6; Broders Decl., ¶ 10; Ex. N (Juncal Depo. at 73:6-24, 197:2-9); Ex. P (Broders Depo. at 51:20-22, 53:9-22); Ex. Q (Van Berckelaer Depo. at 263:17-264:11).]*

Disputed. As an initial matter, as discussed in the AP's response to Obey Clothing's paragraph 12, Mr. Fairey digitally copied and used the Obama Photo to make the Obama Image; as such, the Obama Image was not merely Mr. Fairey's reference. (Crowther Decl. ¶ 15, Ex. V (Dahlberg Rpt. ¶¶ 51-53).) Further, the AP adds, to clarify, that, prior to selling the Obama Merchandise, Obey Clothing knew that the Obama Image was based on a photograph that Mr. Fairey did not have permission to use. Specifically, in a March 25, 2008 e-mail, Mr. Juncal, Obey Clothing's largest owner, expressly acknowledged that because the company did not know who the photographer of the source photograph was, Obey Clothing's sale of merchandise bearing the Obama Image could result in legal claims. (Kehoe Decl. ¶ 63, Ex. 62.) In pertinent part, Mr. Juncal's e-mail states the following:

Another issue is since we do not know who the photographer is that took the photo you used for your art, and Olivia [Perches at Obey Giant Art, Inc.] does not think we could get a full release to sell and use the image to retailers from Obama's camp. Olivia's concerned, and I agree, that if we sold it to Urban and the photographer came at Urban, that could open other legal issues.

(Id.) Mr. Juncal testified at his deposition that one of his concerns in using the Obama Image without knowing who took the Obama Photo was that no one from Obey was able to obtain permission to use the photograph in the Obama Image. (Kehoe Decl. ¶ 19, Ex. 18 (102:7-22) (“Q: Did Olivia Perches express to you that because you didn’t know where the photograph came from they hadn’t been able to obtain permission or they hadn’t obtained permission? . . . A: I’m assuming that would be the case if they don’t know where it came from, yes. Q: That was your understanding as to the source of her concern? A: Correct. Q: Did you express to her that you agreed with her concern prior to this e-mail? A: I don’t remember what I said to her on that, but in this e-mail I express that I agree with that.”).) After Mr. Juncal’s March 2008 e-mail, Obey Clothing did not make any effort to determine whether Mr. Fairey or Obey Clothing had the right to use the Obama Photo as the source of the Obama Image in Obey Clothing’s production, distribution, and sale of the Obama Merchandise. (Kehoe Decl. ¶¶ 19, 35, Ex. 34 (92:22-94:1; 95:4-15); Ex. 18 (94:11-15). Nor did Obey Clothing’s principals make any effort to identify who made the source image or who owned the copyright in the source image. (Kehoe Decl. ¶¶ 19, 35, Exs. 18 (105:2-18), 34 (119:4-120:9).)

19. *The AP’s Code of Ethics forbid Mannie Garcia from creating the scene that is depicted in the Garcia Photo. [Ex. S (Deposition of Mannie Garcia, at 117:11-118:22).]*

Disputed. Obey Clothing’s phrase “creating the scene depicted in the Garcia Photo” is unintelligible, vague, and ambiguous. In making the Obama Photo, Mr. Garcia made numerous creative choices and sought to make a photograph that captured Mr. Obama’s essence. (Kehoe Decl. ¶ 45, 43, Exs. 44 (46:8-24; 50:25-53:6); 42 (35:2-40:18).) Neither Mr. Garcia’s deposition testimony nor the NPPA’s Code of Ethics states, however, that the AP forbade Mr. Garcia from making the Obama Photo. In fact, the AP encourages its photographers to look beyond the news

of the day to make photographs that may have multiple future licensing uses beyond news reporting. (Docket # 155, Declaration of David Ake dated January 6, 2011 ¶ 15).) Mr. Garcia was following this Code of Ethics when he made the Obama Photo. (Kehoe Opp. Decl. ¶ 14; Ex. 86 (M. Garcia Dep. (Mar. 5, 2009) 116:11-117:1).)

20. *The experts agree that Barack Obama's pose in the Garcia Photo is conventional.*
[Exs. U, ¶ 10 & V, ¶ 13.]

Disputed. The AP's art history expert, Professor Laurie Dahlberg, Ph.D., of Bard College, testified that "[t]o say that [the Obama Photo is] conventional is to also say that it's ordinary, and its not an ordinary photograph at all. It's an extraordinary photograph . . . an extraordinary summation of or the conjuring of these qualities that we perceive in the character of Barack Obama that are borne along about expression and gaze and pose and light." (Kehoe Decl. ¶ 43, Ex. 42 (142:14-143:4).) Further, Mr. Fairey's visual studies expert Professor Marita Sturken and Professor Dahlberg agree that the Obama Photo depicts Mr. Obama in a three-quarters pose, with a view from below, and his gaze toward the horizon. (Crowther Decl. ¶ 14, Ex. U (Sturken Rpt. ¶ 10), ¶ 15, Ex. V (Dahlberg Rpt. ¶ 13).) The experts further agree that, by capturing Mr. Obama in this pose and from this angle, the Obama Photo taps into in classical political portraiture and depicts Mr. Obama as a figure who is "thoughtful and pensive, tangible and accessible yet above the crowd." (Crowther Decl. ¶ 14, Ex. U (Sturken Rpt. ¶ 10), ¶ 15, Ex. V (Dahlberg Rpt. ¶ 12).) Professors Sturken and Dahlberg both testified that the word "conventional," as applied in their reports, was synonymous with "classical" and was not used in the pejorative sense. (Kehoe Decl. ¶¶ 44, 45, Exs. 43 (141:14-143:19), 44 (72:24-74:23).)

21. *The AP's claims against One 3 Two are based on the sales of t-shirts, sweatshirts and other items that included the Obama Image. [The AP's First Amended Answer, Affirmative Defenses and Counterclaims filed on November 12, 2009, ¶¶ 55-57 & 189-212.]*

Undisputed. But the AP adds, to clarify, that, in addition to the AP's claims against Obey Clothing for direct and contributory copyright infringement arising out of Obey Clothing's widespread distribution and sale of products, merchandise, and apparel featuring the Obama Image (the "Obama Merchandise"), the AP also maintains its claim against Obey Clothing for violation of the Digital Millennium Copyright Act. (Docket # 54 (AP's Counterclaims and Affirmative Defenses), ¶¶ 189-97, 205-212.) The AP also notes that, setting aside Obey Clothing's sale of the Obama Merchandise to retail stores, the AP can sustain its claims for copyright infringement against Obey Clothing based on the company's payment for, and distribution of, copies of the Obama Image on stickers and posters and in window treatments and magazine advertisements. (See Broders Decl. ¶ 13.)

22. *The Preliminary Report of the AP's expert Kathleen Kedrowski quantified One 3 Two's indirect profits from the "unauthorized use" of the Garcia Photo at [REDACTED]. [Ex. T, ¶ 88 & Ex. D-3.]*

Disputed. In her Preliminary Expert Report dated October 1, 2010, Ms. Kedrowski performed an analysis in order to quantify Obey Clothing's indirect revenue reasonably related or causal connection to the Obama Image and Merchandise. (Crowther Decl., Ex. T, (Kedrowski Rpt. ¶ 88 ("In addition to the direct profits, Fairey and Obey Clothing indirectly profited from the fame, success, and widespread popularity of the Obama Works [broadly defined] . . .").) Consistent with the copyright holder's burden under 17 U.S.C. § 504(b), Ms. Kedrowski did not attempt in her preliminary report to quantify costs or expenses that may, with appropriate

evidence, be deducted from Obey Clothing's indirect-revenue figure. She did, however, expressly note that her indirect-revenue figure for Obey Clothing' was an "up[-]to" number. (Crowther Decl. ¶ 13, Ex. T (Kedrowski Rpt. ¶¶ 95, 98C).) As stated in her preliminary report, Ms. Kedrowski intended to quantify Obey Clothing's indirect revenues reasonably related to the Obama Image and Merchandise by applying the company's compound annual growth rate for the 2008 to 2009 period to the company's non-Obama-Merchandise-related revenues, or residual revenues, for 2008 and 2009. (Crowther Decl. ¶ 13, Ex. T (Kedrowski Rpt. ¶¶ 92-95.) In performing this calculation, Ms. Kedrowski inadvertently included Obey Clothing's residual revenues for 2006 and 2007, resulting in an indirect-revenue number of [REDACTED]. (Crowther Decl. ¶ 13, Ex. T (Kedrowski Rpt. (Exhibit D-3)).)

23. *Kedrowski did not have, or rely on, any consumer survey, public opinion poll or customer feedback information to establish why customers bought products from One 3 Two. [Ex. R (Deposition of Kathleen Kedrowski ("Kedrowski Depo."), Day 2, at 103:23-105:2).]*

Undisputed. But the AP adds, to clarify, that it is not the AP's burden, as the copyright holder, to come forward with this particular evidence. See Andreas v. Volkswagen of America, Inc., 336 F. 3d 789, 797 (8th Cir. 2003); see also William A. Graham Company v. Haughey, 568 F.3d 425, 443 (3rd Cir. 2009); Thorton v. J Jargon Co., 580 F. Supp. 2d 1261, 1278-80 (M.D. Fla. 2008).

24. *Kedrowski does not have substantial experience in the apparel industry. [Ex. R, (Kedrowski Depo., Day 2, at 160:3-162:17).]*

Disputed to the extent that "substantial experience" is vague and ambiguous. Ms. Kedrowski is a managing director at Navigant Consulting, Inc. with over 24 years experience in economics, accounting, and finance. (Crowther Decl. ¶ 13, Ex. T (Kedrowski Rpt. (Exhibit A).)

As listed in her C.V., she has performed a variety of economic, business, and financial analyses for clients in intellectual property, licensing, and other disputes; these analyses include complex damages studies involving, among other things, incremental profits and unjust enrichment.

(Crowther Decl., Ex. T, Exhibit A.) Her extensive work for clients in the litigation process covers a broad array of industries ranging from biotechnology to sporting goods. (*Id.*)

Moreover, as she testified at her deposition, and as listed in her C.V., Ms. Kedrowski has worked as an expert on behalf of clients in the apparel industry. (Crowther Decl. ¶ 11, Exs. R (160:3-162:17), T (Exhibit A).) By contrast, Mark Hair, Obey Clothing's damages expert on the issue of indirect profits, does not have professional experience, outside of the present case, in the apparel industry or with respect to copyright damages. (Kehoe Opp. Decl. ¶ 15, Ex. 87 (Hair Dep. (Dec. 6, 2010) 63:8-74:11); ¶ 16, Ex. 88 (Expert Report of Mark L. Hair dated November 2, 2010, Exhibit 1.)

25. *Kedrowski testified that the basis for her conclusion that the fame of Shepard Fairey buoyed One 3 Two was that "the fame and notoriety was Mr. Fairey, but it was also the image, and the image is on the clothing sold by [One 3 Two.] So I believe that since the notoriety that is associated with the image itself and if I remember Mr. Juncal's testimony, that this T-shirt should be the seminal one of the people, and if I remember right, or the seminal product that they sold, that's an example of testimony that I'm recalling now that supports the fact that they were receiving a benefit from being able to sell this merchandise." [Ex. R (Kedrowski Depo., Day 2, at 102:22-103:19).]*

Disputed. Regarding the widespread fame and success that Obey Clothing received due to its broad distribution and sale of the Obama Merchandise, Ms. Kedrowski testified, "I believe, as you look at the section within my reports, the fame and notoriety that Mr. Shepard received

and the testimony that relates to all of that that had a halo effect from the Fairey companies to Obey Clothing, because they sold . . . over [REDACTED] worth of merchandise that contained [the Obama Image], is also part of this indirect profit benefit that they received . . . there is an element that I speak about Mr. Van Berckelaer, who is very familiar with the numbers, and he believes, as someone who knows these numbers quite well and the finances of the company, that there is a halo effect And then there is also the testimony of Mr. Fairey and others that they did received increased fame and others that they did received increased fame and notoriety, and Obey Clothing is selling that very image on its clothing, [REDACTED], that relates to the fame and notoriety. So I believe that the flow-through from Mr. Fairey to where the image ultimately is placed on Obey Clothing, on Obey Clothing itself, is all part of the indirect profits that Obey Clothing earned.” (Kehoe Opp. Decl. ¶ 17, Ex ¶ 89 (K. Kedrowski Dep. (Dec. 15, 2010) 96:21-98:11). Ms. Kedrowski further testified as quoted in Obey Clothing’s paragraph 25.

26. *Kedrowski cites testimony of One 3 Two’s accountant, Adam Van Berckelaer that (1) One 3 Two probably received more notoriety as a result of the Obama Merchandise, but that he didn’t believe there was any dollar figure that could be placed on that notoriety, and (2) his personal opinion was that the Obama Merchandise probably increased awareness of One 3 Two somewhat, which may or may not cause people to buy the company’s products, in support of her conclusion that One 3 Two’s sales of the Obama Merchandise cause sales of other, non-related products. [Ex. T, ¶ 88E(i).]*

Disputed to the extent that Mr. Van Berckelaer’s deposition testimony that Ms. Kedrowski references speaks for itself and needs no additional characterization. (Crowther Decl., Ex. T, ¶ 88E(i); Kehoe Opp. Decl. ¶ 18, Ex. 90 (A. Van Berckelaer Dep. (Mar. 11, 2010)

253:11-255:25; 257:10-22); ¶ 19, Ex. 91 (A. Van Berckelaer Dep. (Aug. 26, 2010) 365:12-367:15).)

27. All of the other facts Kedrowski cites to support her opinion that One 3 Two sold products that did not include the Obama Image as a result of One 3 Two's sales of the Obama Merchandise relate to benefits to Shepard Fairey or his companies, or One 3 Two's direct profits from the sales of the Obama Merchandise. [Ex. T, ¶ 88.]

Disputed. As discussed in the AP's response to Obey Clothing's paragraphs 5, 9, and 10, and as Ms. Kedrowski testified at her deposition (Kehoe Opp. Decl. ¶ 17, Ex. 89 (K. Kedrowski Dep. (Dec. 15, 2010) 96:21-98:11), Obey Clothing, together with Shepard Fairey and his various corporate entities, promotes and markets the "Obey" brand. Thus, the evidence cited by Ms. Kedrowski of increased awareness for Shepard Fairey and the "Obey" brand speaks not only to indirect benefits received by Mr. Fairey and his companies but also to those enjoyed by Obey Clothing as a result of its participation in the infringing activities at the core of this case. Obey Clothing markets itself to consumers as a close affiliate of Mr. Fairey, highlighting its connection with Mr. Fairey on its website, obeyclothing.com, and in its company domain name, e-mail addresses, and advertising and marketing materials, all of which refer to it simply as "Obey Clothing." (Kehoe Decl. ¶ 12, Ex. 11; Docket # 151-7, Declaration of Donald Regan Juncal dated January 4, 2011, ("Juncal Decl."), ¶ 3, Ex. H; Kehoe Opp. Decl. ¶ 20; Ex. ¶ 92 (subpages from Obey Clothing's website (last visited January 25, 2011):

<http://obeyclothing.com/#/contact/>; <http://obeyclothing.com/#/propaganda/> (viewing links under "Press" heading).) In fact, Obey Clothing's marketing materials draw no distinction between the Obey brand, Mr. Fairey, and Obey Clothing. (Juncal Decl. ¶ 3, Ex. H, at 49.) Moreover, obeyclothing.com lists Obey Giant Art, as well as Mr. Fairey's design firm, Studio Number One,

Inc., and art gallery, Subliminal Projects, as Obey Clothing's "Family" and has active links to these entities' respective websites. (Kehoe Decl. ¶ 20, Ex. 19.) The site discusses Mr. Fairey's creation of the "Obey" logo and implies that Mr. Fairey himself started Obey Clothing: "Obey Clothing was launched in 2001 when Shepard Fairey saw clothing as an opportunity to be creative on many levels and t-shirts as another canvas for his graphics." (Kehoe Decl. ¶ 12, Ex. 11.) The site also includes photo and video galleries featuring images of Mr. Fairey's designs, gallery displays, and street-art installations. (Kehoe Opp. Decl. ¶ 21; Ex 93 (subpages from Obey Clothing's website (last visited January 25, 2011): <http://obeyclothing.com/#/history/fineart/>; <http://obeyclothing.com/#/history/streetart/>; <http://obeyclothing.com/#/history/posterart/>; <http://obeyclothing.com/#/video/miamiart/>.) Obeyclothing.com even hosts a blog that, in addition to announcing new Obey Clothing products and sales events, tracks Mr. Fairey's major appearances. (Kehoe Opp. Decl ¶ 22; Ex. 94 (subpages from Obey Clothing's website (last visited January 25, 2011): http://obeyclothing.com/news/?p_7405; http://obeyclothing.com/news/?p_7383; http://obeyclothing.com/news/?p_7289; http://obeyclothing.com/news/?p_5920.) In turn, obeygiant.com, Mr. Fairey's website, frequently announces Obey Clothing's promotions and sales, and has active links to obeyclothing.com under its "Industries" section and through its online "Store." (Kehoe Opp. Decl. ¶ 23, Ex. 95 (subpages from Obey Clothing's website (last visited January 25, 2011): (<http://obeygiant.com/headlines/obey-clothing-holiday-sample-sale-2010>; <http://obeygiant.com/store/clothing/>.) Notably, obeyclothing.com does not include a single reference to One 3 Two, Inc. (Kehoe Opp. Decl. ¶ 29; Ex. 101 (home page for Obey Clothing's website, <http://obeyclothing.com/> (last visited January 25, 2011) ("OBEY CLOTHING ALL RIGHTS RESERVED 2008-2010); ¶ 30; Ex. 102 (subpage to Obey Clothing's website,

<http://obeyclothing.com/#/contact/> (listing all contact addresses under Obey Clothing).) Obey Clothing has acknowledged that Mr. and Ms. Fairey, as owners of Obey Giant Art, Inc. and Obey Giant LLC, “definitely do market the brand as a whole.” (Kehoe Opp. Decl. ¶ 7, Ex. 79 (D. Juncal Dep. (Mar. 23, 2010) 49:24-50:23).) For its part, Obey Clothing frequently uses Mr. Fairey’s artwork and art-related appearances as a marketing tool for its apparel and merchandise. For example, to coincide with Mr. Fairey’s 2010 show at the (now-closed) Deitch Project gallery in Manhattan, Obey Clothing opened a “pop-up shop,” or temporary storefront, just blocks away to sell Obey Clothing apparel and merchandise (photographed below). (Kehoe Opp. ¶ 25, Ex. 97 (subpages from Obey Clothing’s website (last visited January 25, 2011):

http://obeyclothing.com/news/?p_5722; http://obeyclothing.com/news/?p_6041).)



More recently, at a retail store in Irvine, California, Obey Clothing held a promotional event that prominently featured Mr. Fairey’s artwork and included a live artwork installation by one of Mr. Fairey’s art assistants. (Kehoe Opp. ¶ 26, Ex. 98 (subpages from Obey Clothing’s website (last visited January 25, 2011): http://obeyclothing.com/news/?p_6893; http://obeyclothing.com/news/?p_6922).) Finally, Obey Clothing also sponsored the distribution of numerous promotional copies of the Obama Image on posters and stickers and in magazine advertisements and storefront window treatments. (See Broders Decl. ¶ 13.)

28. *Kedrowski offered only one mathematical calculation to determine the amount of indirect profits that One 3 Two gained as a result of sales of the Obama Merchandise, and that is her Compound Annual Growth Rate or “CAGR” analysis that appears at Exhibit D-3 to her preliminary report. [Ex. R (Kedrowski Depo., Day 1, at 257:19-25).]*

Disputed to the extent that Obey Clothing is attempting to portray Ms. Kedrowski’s compound-annual-growth-rate methodology and analysis as consisting of only one mathematical calculation. As Ms. Kedrowski’s Preliminary Expert Report makes clear, her methodology, as applied to Obey Clothing, required at least three different calculations: (1) she calculated Obey Clothing’s compound annual growth rate for 2008 through 2009; (2) she calculated Obey Clothing’s residual-revenue pools from 2006 and 2009; and (3) she intended to apply Obey Clothing’s compound annual growth rate to Obey Clothing’s combined residual revenue for 2008 and 2009. (Crowther Decl., Ex. T, (Kedrowski Rpt. ¶¶ 91-95, Exhibit D-3.) Furthermore, Ms. Kedrowski also performed a trend-line analysis of Obey Clothing’s growth from 2006 through 2009, comparing Obey Clothing actual growth during this period to its growth trend-line, which she calculated using the least-squares methodology. (Crowther Decl., Ex. T, ¶¶ 91; Kehoe Opp. Decl. ¶ 17, Ex. 89 (K. Kedrowski Dep. (Dec. 15, 2010) 11:20-13:9.)

29. *Kedrowski’s CAGR analysis compared One 3 Two’s financial performance for the year 2007 to its performance in 2009, and calculated what rate would achieve that growth at a consistent rate over the two-year period. [Ex. R (Kedrowski Depo., Day 1, at 241:19-243:19); Ex. T, at Ex. D-3.]*

Undisputed. But the AP adds, to clarify, that Ms. Kedrowski compound-annual-growth-rate analysis measured the annual revenue growth of Obey Clothing in 2008 and 2009, using Obey Clothing’s 2007 annual revenue as a starting point. (Crowther Decl., Ex. T (Kedrowski

Rpt. Exhibit D-3).) This analysis resulted in a smoothed, annualized growth rate of 16.7 percent for these two years. (Id.)

30. *According to Kedrowski, One 3 Two generated revenues not directly related to the Obama Merchandise in the total amount of [REDACTED] between 2006 and 2009, which Kedrowski calls One 3 Two's "residual revenues." [Ex. T, at Ex. D-3.]*

Undisputed.

31. *To calculate the indirect profits One 3 Two received from the sales of the Obama Merchandise, Ms. Kedrowski multiplied the residual revenues by the CAGR she had calculated previously, the product of which was [REDACTED]. [Ex. T, at Ex. D-3.]*

Disputed. Consistent with the AP's burden, as copyrighted holder, under 17 U.S.C. § 504 (b), Ms. Kedrowski performed an CAGR analysis in order to quantify the revenue that Obey Clothing earned indirectly as a result of the infringing activities at issue. (Crowther Decl., Ex. T (Kedrowski Rpt. ¶ 95C ("Based upon the plaintiff's burden in determining defendant's profits, . . . indirect revenues . . . from Obey Clothing up to [REDACTED] from non-Infringing Works-related merchandise . . .").) As stated in her preliminary report, Ms. Kedrowski intended to quantify Obey Clothing's indirect revenues reasonably related to the Obama Image and Merchandise by applying the company's compound annual growth rate for the 2008 to 2009 period to the company's residual revenues for 2008 and 2009. (Crowther Decl., Ex. T (Kedrowski Rpt. ¶ 94, fn. 191).) In performing this calculation, Ms. Kedrowski inadvertently included Obey Clothing's residual revenues for 2006 and 2007, resulting in an indirect-revenue number of [REDACTED]. (Crowther Decl., Ex. T (Kedrowski Rpt. (Exhibit D-3), Ex. R.) As Obey Clothing's damages expert, Mark L. Hair, calculated in his November 2, 2010, expert report, Ms. Kedrowski's compound-annual-growth-rate analysis applied to Obey Clothing's

2008 and 2009 residual revenue results in approximately [REDACTED] in indirect revenue. (Kehoe Opp. Decl. ¶ 16, Ex. 88 (Excerpt of the Expert Report of Mark L. Hair dated November 2, 2010 (pages 25-30).)

32. *Ms. Kedrowski conceded that it was an error to include revenues from 2006 and 2007, which preceded the creation of the Obama Image in January 2008, in her analysis. [Ex. R (Kedrowski Depo., Day 2, at 112:2-113:12).]*

Undisputed.

33. *Despite the erroneous inclusion of the 2006 and 2007 data, Ms. Kedrowski did not change her opinion that the reasonable estimate of One 3 Two's indirect profits from the sales of the Obama Merchandise was [REDACTED]. [Ex. R (Kedrowski Depo., Day 2, at 112:2-113:12).]*

Disputed. As stated in her preliminary report, Ms. Kedrowski intended to quantify Obey Clothing's indirect revenues reasonably related to the Obama Image and Merchandise by applying the company's compound annual growth rate for the 2008 to 2009 period to the company's residual revenues for 2008 and 2009. (Crowther Decl., Ex. T, ¶¶ 92-95.) In performing this calculation, Ms. Kedrowski inadvertently included Obey Clothing's residual revenues for 2006 and 2007, resulting in an indirect-revenue number of [REDACTED]. (Crowther Decl., Exs. T (Kedrowski Rpt. (Exhibit D-3)), Ex. R.) Ms. Kedrowski testified at her deposition that the [REDACTED] could remain a reasonable estimate for Obey Clothing's indirect revenue because her compound-annual-growth-rate analysis did not account for potential indirect revenue in 2010 and did not include specific adjustments to control for declining macroeconomic conditions in 2008 and 2009. (Kehoe Opp. Decl. ¶ 17, Ex. 89 (K. Kedrowski Dep. (Dec. 15, 2010) 14:15-16:25; 114:21-116:10; 185:18-188:15).) But, as stated, Ms. Kedrowski intended

that her methodology be applied only to Obey Clothing's residual revenues for 2008 and 2009
a calculation that results in indirect revenue of [REDACTED]. (Crowther Decl., Ex. T, ¶ 94,
Fn. 191; (Kehoe Opp. Decl. ¶ 16, Ex. 88 (Excerpts of the Expert Report of Mark L. Hair dated
November 2, 2010 (pages 25-30).)

The AP's Counterstatement of Material Facts in Opposition to Obey Clothing's Partial Motion for Summary Judgment

1. The "Obey" brand takes its name from a simplified stencil-based image that Mr. Fairey derived from a newspaper photograph of professional wrestler "Andre the Giant" and placed over the slogan "Obey." (Kehoe Decl. ¶ 12, Ex. 11; Crowther Decl., ¶ 6, Ex. M)

2. Obey Giant Art, Inc.'s website, obeygiant.com, links to the following three versions of the "Obey" logo:



(Kehoe Opp. Decl. ¶ 27; Ex. 99 (subpage from Obey Giant Art, Inc.'s website (last visited January 25, 2011) <http://obeygiant.com/free>).)

3. Obey Clothing is One 3 Two, Inc.'s d/b/a. (Docket # 71 (Answer and Affirmative Defenses By Counterclaim Defendant One 3 Two, Inc. d/b/a/ Obey Clothing to The Associated Press's First Amended Answer, Affirmative Defenses and Counterclaims).)

4. Obey Clothing's merchandise and apparel does not reference One 3 Two, Inc. (Kehoe Opp. Decl. ¶ 28; Ex. 100 (subpage to Obey Clothing's website: <http://shop.obeyclothing.com/> (browsing individual-item subpages).)

5. Obey Clothing's website does not include a single reference to One 3 Two, Inc. (Kehoe Opp. Decl. ¶ 29; Ex. 101 (home page for Obey Clothing's website, <http://obeyclothing.com/> (last visited January 25, 2011) ("OBEY CLOTHING ALL RIGHTS RESERVED 2008-2010); ¶ 30; Ex. 102 (subpage to Obey Clothing's website, <http://obeyclothing.com/#!/contact/> (listing all contact addresses under Obey Clothing).)

6. According to Fairey’s business manager, Olivia Perches, Justin McCormack was “instrumental” in bringing Obey Giant and Obey Clothing together to form their merchandising enterprise. (Kehoe Opp. Decl. ¶ 31; Ex. 103 (O.Perches Dep. (Sept. 22, 2009) 69:24-70:6).)

7. Many of Obey Clothing’s apparel and merchandise items prominently feature the “Obey” logo in its various forms, including the examples depicted below:



(Kehoe Opp. Decl. ¶ 32; Ex. 104 (subpages from Obey Clothing’s website and Obey Clothing UK’s website (last visited January 25, 2011):

http://shop.obeyclothing.co.uk/products/9/533/icon_face_tri-blend_t-shirt/;

<http://shop.obeyclothing.com/p-2282-og-face-sweatshirt.aspx>; <http://shop.obeyclothing.com/p-2581-obey-badge-everyday-scoop-neck-tee.aspx>)

8. Obey Clothing uses the “Obey” logo on marketing materials, merchandise tags (or hang-tags), and neck tags, including on the examples depicted below:



(Kehoe Opp. Decl. ¶ 33; Ex. 105 (subpage from Obey Clothing’s website, http://obeyclothing.com/news/?p_7211 (last visited January 25, 2011); ¶ 34; Ex. 106 (true and correct copy of a photograph of Obey Clothing merchandise taken in store in NYC on January 25, 2011); Kehoe Decl. ¶ 68; Ex. 67 (cropped portion).)

9. Mr. Juncal did not produce a copy of the e-mail produced by Romeo Trinidad as OTT026284, attached as Exhibit 62 to Brendan Kehoe’s Declaration dated January 6, 2011, as all of his e-mail prior to April 23, 2008, were allegedly lost and never recovered when he changed computers and his old laptop was “retire[d].” (Kehoe Opp. Decl. ¶ 13, Ex. 85 (Obey Clothing’s Supplemental Responses and Objection to the AP’s First Set of Requests for Production, dated March 12, 2010, 4.)

10. Obey Clothing’s Obama Merchandise featured the “Obey” logo on its front graphic and the “Obey” trade name on its neck-tag and, on certain styles, as its back graphic. (Broders Decl. ¶ 11, Exs. G, F, E; Kehoe Decl. ¶ 68, Ex. 67.)

11. At his deposition, Mr. Juncal described Obey Clothing’s guerilla-marketing approach as “pasting up [art] inside [retail stores] or doing special projects with retailers,” stating that “the youth understands that kind of marketing.” (Kehoe Opp. Decl. ¶ 7, Ex. 79 (D. Juncal Dep. (Mar. 23, 2010) 258:9-259:4.)

12. In a May 30, 2008 e-mail to one of Obey Clothing’s retail-accounts, Mr. Juncal further described Obey Clothing’s marketing approach as “subversive marketing where the person does not feel that they are being marketed to,” calling the marketing style part of Obey Clothing’s “philosophy.” (Kehoe Opp. Decl. ¶ 35, Ex. 107 (OTT 012188-012190).)

13. In the same e-mail, Mr. Juncal stated that the Obama Merchandise that Obey Clothing sold to Urban Outfitters was one of its marketing promotions. (Kehoe Opp. Decl. ¶ 35, Ex. 107 (OTT 012188-012190).)

14. As of June 4, 2008, the t-shirt design bearing the Obama Image that Obey Clothing distributed and sold to Urban Outfitters was that retailer's number-one-selling tee, displacing a design that had held the position for over a year and a half. (Kehoe Opp. Decl. ¶ 36, Ex. 108 (OTT 0019054-55).)

15. As of June 30, 2008, Obey Clothing had decided to offer certain styles of the Obama Merchandise to all of its retailer-store accounts. (Kehoe Opp. Decl. ¶ 37, Ex. 109 (OTT0011860).)

16. By August of 2009, Obey Clothing had sold Obama Merchandise to over 100 of its retail-store customers, including a substantial number of its top-selling accounts such as Nordstrom, Active Ride Shop, Karmaloop, Inc., Metropark, and Zumiez. (Kehoe Decl. ¶ 64, Ex. 63.)

17. More than 43% of Obey Clothing's sales of Obama Merchandise occurred after November 4, 2008. (Kehoe Decl. ¶ 64, Ex. 63.)

18. More than 15% of Obey Clothing sales of Obama Merchandise, or nearly 37,000 units, occurred after February 9, 2009. (Kehoe Decl. ¶ 64, Ex. 63.)

19. Fairey's own marketing materials state that the Obama Image brought Mr. Fairey's art to a "new height of prominence." (Kehoe Opp. Decl. ¶ 38, Ex. 110 (FAIREY124583).)

20. Mr. Fairey's visual studies expert, Professor Marita Sturken, states in her expert report that the Obama Image "put [Mr. Fairey] on the map in an entirely different way,"

(Crowther Decl. ¶ 14, Ex. U (Sturken Rpt. ¶ 40), and introduced him to a much “broader population,” Kehoe Opp. Decl. ¶ 50, Ex. 122 (M. Sturken Dep. (Nov. 24, 2010) 183:17-184:6).)

21. Professor Sturken states further in her report that “[o]f all of [Mr.] Fairey’s works, the [Obama Image] has had the most influence, visibility, and cultural circulation.” (Crowther Decl. ¶ 14, Ex. U (Sturken Rpt. ¶ 59).)

22. In a May 27, 2008 e-mail, Justin McCormack, a co-owner of Obey Giant with Mr. Fairey and his wife, stated that “[w]ith the Obama campaign poster, [the Fairey companies] are getting hit upon from a ton of new companies.” (Kehoe Opp. Decl. ¶ 39, Ex. 111 (MCCORMACK0000175-8).)

23. In a September 2, 2008 e-mail, Shepard Fairey’s wife, Amanda Fairey, suggested to two gallery owners that “I feel that going up at least 15% to 25% from the last shows [sic] prices would be acceptable to the market, especially considering all of this Obama art hype.” (Kehoe Opp. Decl. ¶ 40, Ex. 112 (FAIREY10955-62).)

24. In a September 3, 2008 e-mail, Mr. Fairey stated the listed prices for his work had already been increased by 10 percent and that “we should go up 10% from there.” (*Id.*)

25. *Creativity Magazine* stated in a November 2008 interview with Mr. Fairey that Mr. Fairey’s graphic design firm:

Has received more calls from traditionally mainstream clients, thanks to the popularity of the Obama posters. Fairey cites new projects for Upper Deck and Saks Fifth Avenue as examples and points to the poster campaign as the entry point for clients who may not have been very familiar with his art or street culture in general.

(Kehoe Opp. Decl. ¶ 41, Ex. 113 (FAIREY113622-24, 113624).)

26. In a November 2008 interview with *Creativity Magazine*, Mr. Fairey stated that his art has been a “great marketing tool and an asset to bring in business.” (Kehoe Opp. Decl. ¶ 41, Ex. 113 (FAIREY113622-24, 113623).)

27. In a June 18, 2009 e-mail, Mr. McCormack stated that the Obama Image had placed Mr. Fairey “at th [sic] top of the *artist food chain* and there are lots of commercial projects coming forth.” (Kehoe Opp. Decl. ¶ 42, Ex. 114 (MCCORMACK0000471-74, 0000473).) Similarly, in a January 23, 2009 e-mail, Mr. McCormack noted that the Obama Image had “been good to our royalties!” (Kehoe Opp. Decl. ¶ 51, Ex. 123 ((MCCORMACK0000409).)

28. Not including revenue earned on the Obama Image and Merchandise, Obey Giant Art, Inc.’s annual revenue grew over 41% from the end of its fiscal year in 2007 to the end of its fiscal year in 2009. (Crowther Decl. ¶ 13, Ex. T (Exhibit D-3).)

29. In an October 1, 2008, e-mail, Romeo Trinidad Jr., head of Obey Clothing’s international sales and marketing, told one of the company’s international representatives that “[t]he OBAMA tee was a big ‘free’ marketing thing for us.” (Kehoe Opp. Decl. ¶ 43, Ex. 115 (OTT018818-20).)

30. In a July 27, 2009, e-mail to Mr. Juncal and Mr. Broders, Mr. Trinidad outlined a speech he planned to give at an Obey Clothing marketing meeting, stating in part:

Again, the OBAMA image was a huge one for us, on a philosophical and marketing level, it opened up multiple international tiers (much like middle america [sic]) where demand increases season after season

(Kehoe Opp. Decl. ¶ 44, Ex. 116 (OTT026471-2).)

31. Mr. Van Berckelaer, Obey Clothing’s 30(b)(6) witness on the company’s revenues and expenses, testified at his deposition that Obama Merchandise increased Obey Clothing’s notoriety:

Q: And do you have any way of knowing -- well, let me ask you this. Do you know whether OBEY Clothing has benefitted financially from the sale of the Obama T-shirts in any way other than literally the revenues received from the Obama merchandise?

...

A: Outside of revenue received from selling them, I would -- I would -- I would say that we probably received maybe more notoriety, but I don't know that there's any dollar figure you could put on that.

...

Q: Okay. Is it generally believed -- to your knowledge, is it generally believed within the company that the OBEY Clothing brand is better known today as a result of its sale of the Obama merchandise than it was at the beginning of 2008?

...

A: I can't attest for the rest of the people in the company. I could tell you my opinion, though.

Q: What is your opinion?

A: I believe that -- that we did gain more market awareness after the Obama project.

(Kehoe Opp. Decl. ¶ 18, Ex. 90 (A. Van Berckelaer Dep. (Mar. 11, 2010) 253:9-257:22).)

32. Mr. Van Berckelaer testified in this case that the Obama Merchandise “did increase the awareness of the company to some extent,” which he agreed is “exactly” the purpose of marketing and promotion. (Kehoe Opp. Decl. ¶ 6, Ex. 78 (A. Van Berckelaer Dep. (Aug. 26, 2010) 365:12-367:15).)

33. Mr. Van Berckelaer has admitted that “increasing awareness” can lead to “increased sales.” (Kehoe Opp. Decl. ¶ 6, Ex. 78 (A. Van Berckelaer Dep. (Aug. 26, 2010) 367:1-367:12).)

34. In a March 27, 2009 e-mail to Ms. Fairey, carbon-copying Mr. Juncal and Steve Mellgren of Obey Clothing as well as Mr. Fairey and Obey Giant Art, Inc.’s business manager, Ms. Perches, Mr. Broders advised against expanding the “Obey” brand into a retail line of skateboards, stating:

I believe that the OBEY brand is right at the cusp of being over exposed at the moment. Much of this is attributed to the amazing success of the OBAMA

image. This is a double edged sword in my eyes because there is no doubt that the awareness this has brought the brand is so positive in so many ways. The issue I see is that the presence of OBEY has always been so well tempered and that leaves consumers and accounts hungry for more. Because OBEY is so on the radar right now it of course makes perfect sense to capitalize on the heightened brand awareness for the short term benefit. I feel as if we really need to be cautious during these times to not open new categories just because we can. As always we have long term objectives with the OBEY brand.

(Kehoe Opp. Decl. ¶ 45, Ex. 117 (OTT 000163-4).)

35. In 2008, Obey Clothing's gross revenue grew from approximately [REDACTED] to nearly [REDACTED] an increase of over 50%. (Kehoe Opp. Decl. ¶ 46, Ex. 118 (OTT 0028223-41).)

36. In 2008, Obey Clothing's net profit increased from [REDACTED] to [REDACTED] an increase of over 92%. (Kehoe Opp. Decl. ¶ 46, Ex. 118 (OTT 0028223-41).)

37. From 2006 to 2007, Obey Clothing's revenue grew by approximately 24% and its profit by approximately 27%. (Kehoe Opp. Decl. ¶ 47, Ex 119 (OTT 0028204-22); ¶ 46, Ex. 118 (OTT 0028223-41).)

38. In 2009, Obey Clothing earned [REDACTED] in revenue and realized a profit of nearly [REDACTED]. (Kehoe Decl. ¶ 23, Ex. 22.)

39. In 2008, Obey Clothing's owners received over [REDACTED] in distributions of profits from the company. (Kehoe Decl. ¶ 71, Ex. 70.)

40. In 2009, Obey Clothing's owners received over [REDACTED] in distributions of profits from the company. (Kehoe Decl. ¶ 23, Ex. 22.)

41. In 2006 and 2007 combined, Obey Clothing's owners received approximately [REDACTED] in distributions of profits from the company. (Kehoe Decl. ¶ 72, Ex. 71.)

42. Mr. Van Berckelaer testified in this case that the increased distributions in 2008 and 2009 were related to Obey Clothing's favorable cash position in those years. (Kehoe Opp. Decl. ¶ 19, Ex. 91 (A. Van Berckelaer Dep. (Aug. 26, 2010) 365:12-367:12; 395:15-396:12).)

43. Obey Clothing's [REDACTED] in alleged donations to the purported efforts to promote Mr. Obama's 2008 presidential bid includes five instance where Obey Clothing recorded the wholesale value of promotional apparel items, including "Rock the Vote" t-shirts given to Zumiez Inc., rather than these items' actual cost to Obey Clothing. (Kehoe Opp. Decl. ¶ 48, Ex. 120 (A. Van Berckelaer Dep. (Mar. 11, 2010) Exhibit 4); ¶ 19, Ex. 91 (A. Van Berckelaer Dep. (Aug. 26, 2010) 380:12-386:7); ¶ 49, Ex. 121 (C. Broders Dep. (Mar. 16, 2010) Ex. 24.)

44. Obey Clothing includes in its purported donations to the 2008 Obama campaign the wholesale value of Zumiez promotional t-shirts, which it recorded as [REDACTED]. (Kehoe Opp. Decl. ¶ 19, Ex. 91 (A. Van Berckelaer Dep. (Aug. 26, 2010) 385:5-385:17).)

45. The cost to Obey Clothing to create promotional tees for Zumiez using the Obama Image was approximately [REDACTED]. (Kehoe Opp. Decl. ¶ 19, Ex. 91 (A. Van Berckelaer Dep. (Aug. 26, 2010) 385:5-385:17).)

46. Obey Clothing's damages expert, Mark L. Hair, testified at his deposition in this case that [REDACTED] of Obey Clothing's [REDACTED] in alleged donations should be deducted from the company's revenue as marketing and advertising expenses necessary to the production, distribution, and sale of the Obama Merchandise. (Kehoe Opp. Decl. ¶ 15; Ex. 87 (M. Hair Dep. (Dec. 6, 2010) 244:18-252:9).)

47. In his opening damages report dated November 2, 2010, Obey Clothing's expert Mr. Hair opined that Obey Clothing's indirect revenue related to the Obama Image and Merchandise was up to [REDACTED] (Kehoe Opp. Decl. ¶ 16; Ex. 88 (Hair Rpt. 25-30).)

48. To arrive at his indirect-profit figure of [REDACTED], Mr. Hair deducted estimated costs and expenses that Obey Clothing would have purportedly incurred in generating this indirect revenue. (Kehoe Opp. Decl. ¶ 16, Ex. 88 (Hair Rpt. 29).)

Respectfully submitted by:

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