

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

ECF

Case No. 09-01123 (AKH)

**COUNTERCLAIM DEFENDANT
ONE 3 TWO INC.'S RESPONSE
TO THE ASSOCIATED PRESS'S
RULE 56.1 STATEMENT OF
UNDISPUTED FACTS IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT**

Pursuant to Rule 56.1 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, Counterclaim Defendant One 3 Two, Inc. (“One 3 Two”) sets forth the following response to the Associated Press’s (the “AP”) Rule 56.1 Statement of Undisputed Facts in Support of Its Motion for Summary Judgment (“Statement”). This response also includes One 3 Two’s evidentiary objections to the facts upon which the AP relies.

GENERAL OBJECTIONS AND DEFINITIONS

1. One 3 Two objects to the submission of material facts that are not supported by a citation to admissible evidence, as required by Federal Rule of Civil Procedure 56(e) and Local Civil Rule 56.1(d).
2. One 3 Two objects to the AP’s use of ellipses, bracketed text and other alterations to the extent such alterations distort the meaning of the quoted text.

3. To the extent that One 3 Two admits or fails to dispute a fact, it does so for purposes of this Statement only and it reserves its right to contest each of the AP's factual assertions at trial.

4. One 3 Two reserves the right to challenge the admissibility of any fact included in this Statement.

5. Evidence cited by One 3 Two in support of a particular proposition should not be construed as the only support for the proposition in question.

6. The phrases "do not dispute" and "undisputed" shall mean only that (a) with regard to quoted language, One 3 Two does not dispute that the specific quote appears in the materials to which the AP cites; and (b) with regard to the description of text contained in the materials cited by the AP, One 3 Two does not dispute that the descriptions accurately describe the excerpt selected by the AP.

RESPONSES TO THE AP'S STATEMENT OF UNDISPUTED FACTS

I. THE AP

1. The AP is a not-for-profit membership news cooperative founded in 1846 and owned by its 1,400 U.S. daily-newspaper members. Declaration of Ken Dale dated January 6, 2011 ("Dale Decl.") ¶ 3.

Response: Undisputed, but immaterial.

2. The AP creates content and licenses and distributes it to news media outlets which in turn broadcast and publish the news. Dale Decl. ¶ 8.

Response: Undisputed, but immaterial.

3. With its headquarters in New York City, the AP employs approximately 3,600 people in approximately 300-plus locations around the world. Declaration of John David Ake dated January 6, 2011 ("Ake Decl.") ¶ 3.

Response: Undisputed, but immaterial.

4. The AP maintains a bureau in all fifty states and has more bureaus internationally than any other U.S. news organization. Ake Decl. ¶ 5.

Response: Undisputed, but immaterial.

5. The AP is the only U.S. news organization today with a permanent presence in Pyongyang, North Korea and Port-au-Prince, Haiti, among others. AP is also the only U.S. news organization that maintains a full-service bureau in Kabul, Afghanistan. Though other news organizations have closed their bureaus in Kabul to focus on the war in Iraq, AP has not wavered in its commitment to cover the wars in both Iraq and Afghanistan despite the enormous costs required to do that. Ake Decl. ¶ 6.

Response: Undisputed, but immaterial.

6. The costs of the AP's news operations are funded almost entirely through licensing content. Declaration of Brendan T. Kehoe dated January 6, 2011 ("Kehoe Decl.") ¶ 2 Ex. 1 (K. Dale Dep. (Mar. 26, 2010) 14:5-16:5 ("The Associated Press' entire business model is licensing, 95 percent of our revenue comes from licensing content, whether that be images or video or text or multimedia graphics, whatever we produce")).

Response: Undisputed that Dale testified as is quoted, but immaterial.

7. A primary source of the AP's licensing revenue is the receipt of assessments paid by AP's news-media-outlet owners, or members. Dale Decl. ¶ 10; Kehoe Decl. ¶ 3, Ex. 2 (The AP's Consolidated Financial Statements, Years Ended December 2009 and 2008, at 6 ("The Company's primary source of revenue is from subscription contracts with newspapers, radio and television stations and internet news site providers.")).

Response: Undisputed, but immaterial.

8. Because of the financial difficulties facing the news industry, members have been unable to continue funding the monetary assessments that are used to operate the AP at the same level as they previously had. Dale Decl. ¶ 11.

Response: Undisputed, but immaterial.

9. The AP has developed AP Images, a photo-archive business, as a primary alternative source of revenue. Dale Decl. ¶ 14.

Response: Undisputed that AP Images was developed in late 2005, but immaterial.

10. AP Images makes images available to its customers so that they can license them for myriad different uses, including but not limited to promotional, commercial, editorial, and educational uses, as well as for television and video. Declaration of Farah DeGrave dated January 6, 2011 (“DeGrave Decl.”) ¶ 3; Kehoe Decl. ¶ 4, Ex. 3 (AP0005570 (listing “AP Images Sales by License Type”)).

Response: Disputed. Based on Ex. 3 to the Kehoe Decl., the primary licenses appear to be limited to advertising, art reference, editorial use, and personal use.

11. Through APIImages.com, customers can both browse and search the AP’s entire archive of more than 8.6 million digitized photographs. DeGrave Decl. ¶ 4.

Response: Disputed. On the APIImages.com website home page, it states “[s]earch our online database of over 6 million images” [Ex. TT.¹]

12. AP Images licenses its photos both to be used “as is” and for incorporation into derivative works. DeGrave Decl. ¶ 9.

Response: Disputed. DeGrave’s declaration only refers to one instance of licensing a derivative work, which occurred on December 12, 2008, almost a full year after Shepard Fairey (“Fairey”) created the Obama Image. This testimony does not support that the AP had ever licensed a photo for incorporation into derivative works either before or after that date.

Furthermore, in her deposition, she was not able to identify a single derivative work for which

¹ Unless otherwise noted, all excerpts of deposition transcripts and exhibits referenced herein are attached to the Declaration of Robin C. Crowther in Support of Counterclaim Defendant One 3 Two, Inc.’s Opposition to Counterclaimant The Associated Press’s Motion for Summary Judgment, filed concurrently herewith.

she had licensed an AP photograph, although she speculated that she might have done one such license. [Ex. L (Deposition of Farah DeGrave (“DeGrave Depo.”) at 96:23-98:6).]

13. AP Images licenses its photographs for use by political campaigns and to supporters of political candidates. DeGrave Decl. ¶ 13.

Response: Undisputed, but immaterial.

14. For example, the AP licensed a photograph of Mr. Obama to Flashbags for use as a derivative work on tote bags supporting Mr. Obama. DeGrave Decl. ¶ 13; Kehoe Decl. ¶ 5, Ex. 4 (AP0002615-16). The photograph of Mr. Obama that the AP licensed to Flashbags (left), and Flashbags’ licensed work based on that photograph (right), are shown below (DeGrave Decl. ¶ 13):



AP Photograph



Flashbags’ Licensed Work

Response: Undisputed, but immaterial. The license in question was granted on October 31, 2008, after the Obama Image had been created. Kehoe Decl. ¶ 5, Ex. 4 (AP0002615-16).

The AP charged █████ or a “non promotional bag design, up to 5,000 pieces.” *Id.*

15. The AP has also licensed images to Obama for America for different uses. Kehoe Decl. ¶ 6, Ex. 5 (AP Sales Invoice #365768 (AP0010683-84)); (AP Sales Invoice #376361 (AP0010699-702)); (AP Sales Invoice #376452 (AP0010703-4)).

Response: Undisputed, but immaterial. Two of the licenses were granted on July 31, 2008 and August 1, 2008, after the Obama Image had been created. Kehoe Decl. ¶ 6, Ex. 5 (AP Sales Invoice #376361 (AP0010699-702)); (AP Sales Invoice #376452 (AP0010703-4)).

16. AP Images has specific sales representatives who handle licensing inquiries for campaign-related licensing. DeGrave Decl. ¶ 14; Kehoe Decl. ¶ 7, Ex. 6 (B. Sell Dep. (Feb. 12, 2010) 123:18-124-16).

Response: Undisputed, but immaterial.

17. AP Images also licenses images of political leaders for use in connection with advertising and marketing. DeGrave Decl. ¶ 15.

Response: Disputed. The evidence relied upon is not competent because a copy of the license is not attached.

18. The AP licenses images of President Obama for a variety of purposes, including for editorial (such as magazine covers), merchandise (such as tote bags), and for advertising (such as for Apple Computer, Inc.). DeGrave Decl. ¶¶ 11, 13, 16.

Response: Disputed, but immaterial. Some of the evidence relied upon is not competent because copies of the licenses are not attached. Moreover, the licenses in question occurred after the Obama Image was created and so would be immaterial even if supported by competent evidence.

19. AP's sales representatives customize each license to a commercial customer based on the particular characteristics of each customer's planned use and AP's pricing guidelines. Kehoe Decl. ¶ 8, Ex. 7 (F. DeGrave Dep. (Mar. 23, 2010) 29:5-30:20; 56:13-57:23; 61:18-65:7).

Response: Undisputed, but immaterial.

20. It is difficult, if not impossible, for the AP to determine which images will be successful in generating substantial revenues. The images that are successful are important as they help to fund the entire business. Declaration of James Gerberich dated January 8, 2011 ("Gerberich Decl.") ¶ 9.

Response: Undisputed, but immaterial.

21. Over the past several years, the AP has dedicated significant resources to the creation and development of AP Images' photo-licensing business, including the AP Images Web-based platform, located at APImages.com. Dale Decl. ¶ 16.

Response: Undisputed, but immaterial.

22. Specifically, to develop AP Images, the AP has made significant investment in personnel, technology, additional photo equipment, a reorganization of the company away from regional control of image sales, and the hiring of new managers and sales staff with experience and expertise in the business of image licensing. Dale Decl. ¶ 17.

Response: Undisputed, but immaterial.

23. Creating AP Images has involved substantial capital investments. From 2005 through 2010 the AP has invested \$7.6 million in capital in AP Images. Dale Decl. ¶ 18; Kehoe Decl. ¶ 9, Ex. 8 (AP0006810-38).

Response: Disputed, but immaterial. The AP's expenditures must be compared to the significant revenues that it generates from its image licensing business and the profitability of this business. For each of the years 2007 through 2009, the AP generated annual revenues of more than [REDACTED] from its image licensing business. [Ex. N (Deposition of Ken Dale ("Dale Depo")) at 54:13-23 [REDACTED] in revenues in 2007), 56:13-18 [REDACTED] in 2008), 61:14-23 (either [REDACTED] or [REDACTED] in 2009)].] For each of those years, its profit margin remained at about 20 percent, meaning that the AP generated *profits* of between [REDACTED] [REDACTED] [REDACTED] for each of those years. [*Id.* at 58:21-59.] Also, Kehoe Decl. ¶ 9, Ex. 8 (AP0006810-38) does not appear to support the fact.

24. Since launching AP Images in 2005, the AP has sought to increase the amount of image content that is available for licensing. Ake Decl. ¶ 13.

Response: Undisputed, but immaterial.

25. To accomplish this, the AP has made a number of practical changes to ensure that the AP generates a steady stream of content for licensing through AP Images. Ake Decl. ¶ 14.

Response: Undisputed, but immaterial.

26. For example, Washington-based staff photographers are required to archive all of the images they create onto company-supplied external hard disks. Often the entire assignment is sent to AP Images where photo editors edit and transfer the images to AP Images' archive of images. Under previous practice, many of the images were deleted when the camera recording disks were reused for the next assignment. Ake Decl. ¶ 14.

Response: Undisputed, but immaterial.

27. Another change is that AP emphasizes to its photographers that they should not only cover the news of the day, but should also look beyond the news of the day to create additional content for an unlimited variety of potential future licensing uses. Ake Decl. ¶ 15.

Response: Disputed insofar as this fact is not based on competent evidence as this statement is inadmissible hearsay.

28. These efforts have increased the overall amount of content available through AP Images, which is able to offer content for licensing beyond what is used for AP's news-reporting operations. Ake Decl. ¶ 17.

Response: Undisputed, but immaterial.

29. The AP's annual cost of acquiring and producing its images was more than \$56 million in 2009 and more than \$247 million from 2006 through 2009. Dale Decl. ¶ 19; Kehoe Decl. ¶ 10, Ex. 9 (AP00011063).

Response: Disputed, but immaterial. The AP's expenditures must be compared to the significant revenues that it generates from its image licensing business and the profitability of this business. For each of the years 2007 through 2009, the AP generated annual revenues of more than [REDACTED] from its image licensing business. [Ex. N (Deposition of Ken Dale at 54:13-23 [REDACTED] in revenues in 2007), 56:13-18 [REDACTED] in 2008), 61:14-23 (either [REDACTED] or [REDACTED] in 2009)).] For each of those years, its profit margin remained at about 20 percent, meaning that the AP generated profits of between [REDACTED] to [REDACTED] for each of those years. [*Id.* at 58:21-59.]

30. According to the AP's estimates, AP Images adds more than 4,000 photographs a day to its photo-archive database, which today has approximately 8.6 million unique images Gerberich Decl. ¶¶ 4-5.

Response: Disputed, but immaterial. On the APImages.com website home page, it states “[s]earch our online database of over 6 million images. . . .” [Ex. TT.]

II. SHEPARD FAIREY AND HIS COMPANIES

31. Shepard Fairey is a graphic designer, artist, entrepreneur, merchandiser, and business owner. Docket # 54 (AP's First Amended Answer and Counterclaims dated Nov. 12, 2009, ¶ 67; Docket # 58 (Amended Answer and Affirmative Defenses of Plaintiffs and Counterclaim Defendants dated Nov. 13, 2009, ¶ 67).

Response: Undisputed.

32. Mr. Fairey founded the “Obey” brand. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 53:18-54:18); Kehoe Decl. ¶ 12, Ex. 11 (Obey Clothing's website, <http://obeyclothing.com/#/history/>).

Response: Disputed. The evidence cited does not support the statement. Furthermore, to the extent this claims that One 3 Two d/b/a Obey Clothing was founded by Fairey, further disputed as two of One 3 Two's principals, Christopher Broders and Steve Mellgren approached Fairey with a proposal to be his exclusive licensee for apparel, and One 3 Two ultimately negotiated an exclusive license agreement with Fairey's company, Obey Giant LLC.

[Declaration of Christopher Broders in Support of One 3 Two's Motion for Summary Judgment (“Broders Decl.”), ¶ 3.]

33. Mr. Fairey and his wife and business partner, Amanda Fairey, own the corporation Obey Giant Art, Inc. (“Obey Giant Art”) and Studio Number One, a California-based graphic design firm. Kehoe Decl. ¶ 13, Ex. 12 (O. Perches Dep. (Sept. 22, 2009) 69:9-17; 71:24-72:10).

Response: Undisputed, but immaterial.

34. Obey Giant Art is a California corporation that engages in the business of selling and distributing Fairey's artwork and merchandise. Kehoe Decl. ¶ 13, Ex. 12 (O. Perches Dep. (Sept. 22, 2009) 72:22-75:19).

Response: Undisputed, but immaterial.

35. Obey Giant Art manages the website ObeyGiant.com and sells Mr. Fairey's screen prints and posters and other various products under the "Obey" trademark. Kehoe Decl. ¶ 13, Ex. 12 (O. Perches Dep. (Sept. 22, 2009) 72:19-75:19); Ex. 13 (Obey Giant's website, <http://obeygiant.com/store/>).

Response: Disputed. The evidence cited does not support this fact.

36. Mr. and Mrs. Fairey are also the majority owners, and their partner Justin McCormick is the minority owner, of Obey Giant Art LLC ("Obey Giant LLC"). Kehoe Decl. ¶ 13, Ex. 12 (O. Perches Dep. (Sept. 22, 2009) 69:18-72:18).

Response: Disputed; the evidence cited states that the entity in question is Obey Giant LLC, not Obey Giant Art LLC. Kehoe Decl. ¶ 13, Ex. 12 (O. Perches Dep. (Sept. 22, 2009) 69:18-72:18).

37. Obey Giant LLC is a California limited liability corporation that owns trademark registrations for "Obey" and the "Obey" stylized logo (together, the "Obey Logo"). Kehoe Decl. ¶ 13, Ex. 12 (O. Perches Dep. (Sept. 22, 2009) 75:20-76:16); Kehoe Decl. ¶ 15, Ex. 14 (Amended and Restated Trademark Licensing Agreement dated July 1, 2006, between Obey Giant LLC and One 3 Two, Inc., d/b/a Obey Clothing ("Trademark License Agreement") (FAIREY61283.001-3.036)).

Response: Disputed as not supported by competent evidence. Ex. 14 to the Kehoe Decl. is not properly authenticated. Also, the evidence cited does not support the fact.

38. Obey Giant LLC exclusively licenses the Obey Logo to Obey Clothing for use on clothing pursuant to a Trademark Licensing Agreement. Kehoe Decl. ¶ 13, Ex. 12 (O. Perches Dep. (Sept. 22, 2009) 75:20-76:16).

Response: Undisputed.

39. Mr. Fairey has on numerous occasions used a pre-existing photograph or work to create one of his images. Kehoe Decl. ¶ 16, Ex. 15 (FAIREY104954 - FAIREY104983);

FAIREY104988-104989); Kehoe Decl. ¶ 17, Ex. 16 (S. Fairey Dep. (Mar. 17, 2010) Exs. 102, 106, 107, 108, 110).

Response: Disputed as not supported by competent evidence. Exs. 15 and 16 to the Kehoe Decl. are not properly authenticated.

40. In a recent article, Mr. Fairey's expert, Professor Marita Sturken, points out that Mr. Fairey's style has been criticized as "too derivative" based on its "appropriative imaging techniques":

Shepard Fairey's struggles with the ownership of public spaces, which have resulted in his constant arrest, have also extended to his appropriative imaging techniques. In the art world, this has produced the criticism of his style as too derivative to be regarded museum-world status.

Kehoe Decl. ¶ 18, Ex. 17 (Sarah Banet-Weiser & Marita Sturken, *The Politics of Commerce: Shepard Fairey and the New Cultural Entrepreneurship*, in *Blowing Up the BRAND: Critical Perspectives on Promotional Culture* 263-283, 278 (Melissa Aronczyk & Devon Powers eds. 2010).

Response: Disputed insofar as the larger document also speaks for itself and, in any case, is immaterial.

III. OBEY CLOTHING

41. Obey Clothing is a California corporation that is the exclusive licensee of Obey Giant LLC for the use of the Obey Logo on apparel, and also distributes certain of Mr. Fairey's images on apparel. Kehoe Decl. ¶ 15, Ex. 14 (Trademark License Agreement (FAIREY61283.001-3.036)).

Response: Disputed as not supported by competent evidence. Ex. 14 to the Kehoe Decl. is not properly authenticated. Undisputed that One 3 Two is a company based in Irvine, California and that it is the exclusive licensee for apparel of Fairey's company, Obey Giant LLC. One 3 Two's Statement Pursuant to Local Rule 56.1 in Support of its Motion for Summary Judgment ("One 3 Two Sep. Stmt."), Nos. 1, 6. Respectfully refer to Ex. B to the Broders Declaration, for a true and complete statement of the contents of the Trademark License Agreement, which speaks for itself.

42. Obey Clothing is a privately-held company that is owned by the following individuals (with approximate ownership interests): Regan Donald (“Don”) Juncal (33%), Christopher Broders (15%), Steve Mellgren (29%), Eric Singer (15%), Michael Ternosky (4%), Dale Moody (5%). Kehoe Decl. ¶ 19, Ex. 18 (D. Juncal Dep. (Mar. 23, 2010) 42:1–42:20).

Response: Undisputed.

43. Obey Clothing has long been associated with Mr. Fairey and his “Obey” brand. Kehoe Decl. ¶ 20, Ex. 19 (see Obey Clothing’s website, <http://obeyclothing.com/#/family/> (listing Obey Giant “family”)); Kehoe Decl. ¶ 12, Ex. 11 (see Obey Clothing’s website, <http://obeyclothing.com/#/history/>).

Response: Disputed. The evidence cited does not support the statement that “Obey Clothing has long been associated with Fairey and his ‘Obey’ brand.” Undisputed that One 3 Two has a contractual relationship with the artist Fairey whereby One 3 Two is the exclusive licensee for apparel of Fairey’s company, Obey Giant LLC. One 3 Two Sep. Stmt. No. 1.

44. Obey Clothing distributes and sells apparel and merchandise bearing Mr. Fairey’s images to national retailers, such as Nordstrom’s, Zumiez, and Urban Outfitters, as well as to other international retailers. Kehoe Decl. ¶ 21, Ex. 20 (see Obey Clothing’s website, <http://obeyclothing.com/#/stockist/> (follow the “United States” and “International” hyperlinks for a list of major retailers)).

Response: Disputed. The evidence cited does not support the statement that the apparel and merchandise sold by One 3 Two “bear[s] Mr. Fairey’s images.” Undisputed that One 3 Two distributes and sells apparel and other merchandise “to national retailers, such as Nordstrom’s, Zumiez, and Urban Outfitters, as well as to other international retailers.”

45. Obey Clothing also directly sells apparel and merchandise online through its website [Obeyclothing.com](http://obeyclothing.com). Kehoe Decl. ¶ 22, Ex. 21 (see Obey Clothing’s website, <http://shop.obeyclothing.com/>).

Response: Undisputed, but immaterial.

46. In 2009, Obey Clothing earned ██████████ million in gross revenue. Kehoe Decl. ¶ 23, Ex. 22 (OTT0028254-59).

Response: Disputed as not supported by competent evidence. Ex. 22 to the Kehoe Decl. is not properly authenticated.

47. Obey Clothing pays to Obey Giant LLC a tiered royalty of up to [REDACTED] of net sales on merchandise and apparel bearing the Obey Logo and/or Mr. Fairey's images. Kehoe Decl. ¶ 15, Ex. 14 (Trademark License Agreement (FAIREY61283.001-3.036)).

Response: Disputed as not supported by competent evidence. Ex. 14 to the Kehoe Decl. is not properly authenticated. Respectfully refer to Ex. B to the Broders Decl. for a true and complete statement of the contents of the Trademark License Agreement.

48. Obey Clothing pays Obey Giant LLC a [REDACTED] marketing-and-consulting fee on all full-royalty sales. Kehoe Decl. ¶ 24, Ex. 23(A. Van Berckelaer Dep. (Mar. 11, 2010) 34:1-35:1).

Response: Undisputed.

49. Obey Clothing, **as licensee**, has agreed to indemnify Obey Giant LLC, **as licensor**, for the use of Mr. Fairey's artwork. Kehoe Decl. ¶ 15, Ex. 14 (Trademark License Agreement (FAIREY61283.001-3.036)).

Response: Disputed as not supported by competent evidence. Ex. 14 to the Kehoe Decl. is not properly authenticated. Respectfully refer to Ex. B to the Broders Decl. for a true and complete statement of the contents of the Trademark License Agreement.

50. The indemnity provision acknowledges that Mr. Fairey "occasionally incorporates into [his] art ... [the] **protectable intellectual property of a third party.**" *Id.* (emphasis added).

Response: Disputed as not supported by competent evidence. Ex. 14 to the Kehoe Decl. is not properly authenticated. Respectfully refer to Ex. B to the Broders Decl. for a true and complete statement of the contents of the Trademark License Agreement which contains a complete version of the above statement. Undisputed that paragraph 1.8 of the Trademark License Agreement provides in part: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [Broders Decl., Ex. B, ¶ 1.8.]

51. Pursuant to the terms of the Trademark License Agreement, Obey Clothing reproduces Mr. Fairey’s designs, including those based on pre-existing works, on merchandise and apparel. Kehoe Decl. ¶ 15, Ex. 14 (Trademark License Agreement (FAIREY61283.001-3.036)); Kehoe Decl. ¶ 25, Ex. 24 (OTT000644-46; OTT000830-832).

Response: Disputed as not supported by competent evidence. Exs. 14 and 24 to the Kehoe Decl. are not properly authenticated. Respectfully refer to Ex. B to the Broders Decl. for a true and complete statement of the contents of the Trademark License Agreement. Undisputed that One 3 Two sells clothing and other merchandise pursuant to its license agreement with Obey Giant and that it sold merchandise with Fairey’s Obama Image which was created using the Garcia Photo as a reference. One 3 Two Sep. Stmt. Nos. 7, 11, 12, 15.

52. Under the terms of the Obey Giant/Obey Clothing License Agreement, Obey Clothing distributes and sells through its regular wholesale and retail channels merchandise and apparel bearing reproductions of Mr. Fairey’s designs, including those based on pre-existing works. Kehoe Decl. ¶ 26, Ex. 25 (Obey Clothing’s website, <http://obeyclothing.com/news/?p=3292>); Kehoe Decl. ¶ 27, Ex. 26 (OTT027330-36).

Response: Disputed as not supported by competent evidence. Exs. 25 and 26 to the Kehoe Decl. are not properly authenticated, nor do they support the statement above. Respectfully refer to Ex. B to the Broders Decl. for a true and complete statement of the contents of the Trademark License Agreement.

IV. PRIOR THIRD PARTY CLAIMS AGAINST FAIREY AND OBEY CLOTHING

53. In July 2007, Mr. Fairey settled a dispute with the estate of Cuban poster artist Felix René Mederos regarding his unauthorized use a poster image by Mr. Mederos as a source image for a t-shirt that Fairey provided to Obey Clothing. Kehoe ¶ 28, Ex. 27 (FAIREY105177-79; FAIREY105206-208).

Response: Disputed as not supported by competent evidence. Ex. 27 to the Kehoe Decl. is not properly authenticated and is also a privileged settlement communication. In light of the nature of the evidence, One 3 Two is concurrently filing a motion to strike this and other evidence regarding settlements pursuant to Rule 408 of the Federal Rules of Evidence.

54. Mr. Fairey settled the Mederos dispute by paying compensation to the Mederos estate for the sale of t-shirts that were based on the Mederos image and produced by Obey Clothing. Kehoe ¶ 29, Ex. 28 (FAIREY105002-5003). Below is a copy of the Mederos image and the t-shirt put out by Obey Clothing:



Mederos Image

Obey Clothing T-shirt

Response: Disputed as not supported by competent evidence. Ex. 28 to the Kehoe Decl. is not properly authenticated and is also a privileged settlement communication; there is also no evidentiary support at all for the above images. In light of the nature of the evidence, One 3 Two is concurrently filing a motion to strike this and other evidence regarding settlements pursuant to Rule 408 of the Federal Rules of Evidence.

55. Justin McCormack, co-owner with Shepard Fairey of Obey Giant LLC, warned Mr. Juncal in an October 2007 e-mail that, because of Mr. Fairey's use of pre-existing works, Obey Clothing needed to exercise independent judgment in deciding whether it was appropriate

to use Mr. Fairey's designs on t-shirts:

At the end of the day, we must reiterate that not all of Shepard's art can translate to apparel and, in lieu of submitting t-shirt art for our approval, you need to use your own best / educated judgement [sic].

Kehoe ¶ 30, Ex. 29 (MCCORMACK000162-165).

Response: Disputed as not supported by competent evidence. Ex. 29 to the Kehoe Decl. is not properly authenticated and constitutes hearsay to the extent the AP seeks to introduce statements by Justin McCormack for the truth of those statements. Also disputed because the email quoted above concerned publicity rights of artists (such as Morrissey) as opposed to copyright claims by the creators of pre-existing works. *See* Kehoe ¶ 30, Ex. 29 (MCCORMACK000162-165). Regan Donald Juncal testified that he understood this email to mean that McCormack was trying to limit his liability and that "if Shepard creates a piece of fine art, we have to understand whether or not that's applicable for a T-shirt and for sale." [Ex. BB (Deposition of Regan Donald Juncal ("Juncal Depo"). at 324:1-17).]

56. Beginning at least as early as November 2006, Bravado International Group Merchandising Services, Inc. ("Bravado") asserted a series of claims against Fairey and Obey Clothing for the use of Bravado's intellectual property on Obey Clothing's merchandise. Kehoe Decl. ¶ 31, Ex. 30 (FAIREY119924-25).

Response: Disputed as not supported by competent evidence. Ex. 30 to the Kehoe Decl. is not properly authenticated and is also a privileged settlement communication. The email also does not indicate that Bravado was asserting any claims against One 3 Two (Obey Clothing) much less that it was due to the use of Bravado's intellectual property on One 3 Two's merchandise. In light of the nature of the evidence, One 3 Two is concurrently filing a motion to strike this and other evidence regarding settlements pursuant to Rule 408 of the Federal Rules of Evidence.

57. Bravado asserted that images made by Mr. Fairey and Obey Clothing had infringed Bravado's intellectual property rights. Kehoe Decl. ¶ 32, Ex. 31 (D. Juncal Dep. (Aug. 26, 2010) 302:8-305:11); Kehoe Decl. ¶ 33, Ex. 32 (D. Juncal Dep.) (Aug. 26, 2010) Ex. 33, Ex. 34).

Response: Disputed. The claims at issue primarily involved publicity rights, as opposed to any copyright claims. In particular, they involved: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Kehoe Decl. ¶ 32, Ex. 31 (D. Juncal Dep. (Aug. 26, 2010) 302:8-305:11); Kehoe Decl. ¶ 33, Ex. 32 (D. Juncal Dep.) (Aug. 26, 2010) Ex. 33, Ex. 34); [Ex. BB (Juncal Depo. at 316:16-317:18; 333:11-21; 337:1-14).] Also disputed as not supported by competent evidence. Exs. 33 and 34 to the Kehoe Decl. are not properly authenticated and contain privileged settlement information. In light of the nature of the evidence, One 3 Two is concurrently filing a motion to strike this and other evidence regarding settlements pursuant to Rule 408 of the Federal Rules of Evidence.

58. In September 2008, Obey Clothing entered into a settlement agreement with Bravado regarding its claims that Fairey and Obey Clothing had used Bravado's intellectual property on apparel. Kehoe ¶ 32, Ex. 31 (D. Juncal Dep. (Aug. 26, 2001) 333:1-25).

Response: Disputed as not supported by competent evidence. Undisputed that One 3 Two entered into a settlement agreement with Bravado, but the fact of the settlement with Bravado is privileged, inadmissible, irrelevant, and immaterial. In light of the nature of the evidence, One 3 Two is concurrently filing a motion to strike this and other evidence regarding settlements pursuant to Rule 408 of the Federal Rules of Evidence.

59. As part of the Bravado settlement, [REDACTED]
[REDACTED] Kehoe ¶ 32, Ex. 31 (D. Juncal Dep. (Aug. 26, 2001) 335:4-24).

Response: Disputed as not supported by competent evidence. Undisputed that One 3
Two [REDACTED]

[REDACTED] In light of the nature of the
evidence, One 3 Two is concurrently filing a motion to strike this and other evidence regarding
settlements pursuant to Rule 408 of the Federal Rules of Evidence.

60. Don Juncal, one of Obey Clothing’s owners, likened the settlement amount to a
“cost of doing business.” Kehoe ¶ 32, Ex. 31 (D. Juncal Dep. (Aug. 26, 2001) 335:4-336:17).

Response: Disputed as not supported by competent evidence. Undisputed that One 3
Two [REDACTED]

[REDACTED] In light of the nature of the
evidence, One 3 Two is concurrently filing a motion to strike this and other evidence regarding
settlements pursuant to Rule 408 of the Federal Rules of Evidence.

Also disputed to the extent that it misstates Juncal’s testimony. When asked why One 3
Two [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] [Ex. BB (Juncal
Depo., 335:13-24).] Furthermore, the full context of his comment regarding the cost of doing
business is the following response, in which he acknowledges that he [REDACTED]

[REDACTED]

[Redacted] [Id. at 336:11-17.]

V. FAIREY'S AND OBEY CLOTHING'S PRIOR LICENSING OF PHOTOGRAPHS

61. In or around January 2008, Mr. Fairey secured rights for Obey Clothing to produce and sell t-shirts featuring Mr. Fairey's work based on Glen Friedman's photograph of Public Enemy. Kehoe Decl. ¶ 34, Ex. 33 (FAIREY78794-97 ("Note that we [Obey Clothing] have also agreed to the payment Shepard structured with Glen E. Friedman to cover the cost of the rights to use his picture of Public Enemy"); Kehoe Decl. ¶ 35, Ex. 34 (C. Broders Dep. (Mar. 16, 2010) 107:12-109:24).

Response: Disputed as not supported by competent evidence. Ex. 33 to the Kehoe Decl. is not properly authenticated. Also disputed because the evidence in question does not support that Fairey secured the rights in question, or when any such agreement took place.

62. In December 2007, Mrs. Fairey secured the right for Obey Clothing to produce and sell t-shirts featuring designs based on graffiti artist WK Interact's photographs. Kehoe Decl. ¶ 34, Ex. 33 (FAIREY78794-97).

Response: Disputed as not supported by competent evidence. Ex. 33 to the Kehoe Decl. is not properly authenticated.

63. Obey Clothing's principals understood that it needed to secure from photographers the rights to use their photographs in Obey Clothing's merchandising activities. Kehoe Decl. ¶ 36, Ex. 35 (OTT000191-93); Kehoe Decl. ¶ 37, Ex. 36 (FAIREY4000001-08).

Response: Disputed as not supported by competent evidence. Exs. 35 and 36 to the Kehoe Decl. are not properly authenticated. Also disputed because the evidence does not support the fact. When asked at his deposition whether One 3 Two had become knowledgeable as to when it needs to get clearance from a photographer, Broders responded "I'm familiar with the fact that licensing or rights need to be obtained for certain projects but not every project." [Ex. CC (Deposition of Christopher Broders ("Broders Depo.") at 103:24-104:12).] Broders also testified that One 3 Two did not have any formal policies regarding when to obtain a license

for the use of a photograph. [*Id.* at 106:4-9.] Broders also testified “I will say in Shepard’s body of work there are photographic references that are used. However, there might be one element in a hundred that’s pulled from it. So it’s subjective. So at those points we do not obtain licenses for the photographic images.” [*Id.* at 116:14-19.] Juncal testified that he did not know the scope of a photographer’s legal rights and that he was given the impression that knowing the identity of the photographer was not important if Fairey “transformed the image enough.” [Ex. BB (Juncal Depo. at 99-102 and 106-107).] Juncal further testified that he did not consider himself knowledgeable as to when One 3 Two needs to obtain a license and when it does not. [*Id.* at 213:1-6.]

64. In a January 4, 2008 e-mail to Chris Broders of Obey Clothing, Amanda Fairey, Mr. Fairey’s wife and business partner, pointed out to Mr. Broders the need to execute “legal” agreements with the photographers whose images were incorporated in the designs and merchandise that Obey Clothing offered, using as an example a Glen Friedman photograph of Public Enemy:

[W]e need something more “legal” for collab[oration]s like this . . . We also need to ALWAYS REMEMBER that we have to think of the “Personality (Public Enemy) Depicted in the photo”, [sic] the “Photographer” (Glen Friedman) and the “Artist” illustrating the the [sic] photo (in this case, Shepard).

Kehoe Decl. ¶ 37, Ex. 36 (FAIREY4000001-08) (original emphasis)).

Response: Disputed as not supported by competent evidence. Ex. 36 to the Kehoe Decl. is not properly authenticated.

65. In an October 9, 2008 e-mail soliciting the rights to use the likeness of Martin Luther King, Jr., Mr. Juncal assured a representative of the Martin Luther King Center that Obey Clothing was “well versed on the need to get clearance on photographs used from the photographers.” Kehoe Decl. ¶ 36, Ex. 35 (OTT000191-3).

Response: Disputed as not supported by competent evidence. Ex. 35 to the Kehoe Decl. is not properly authenticated. Disputed to the extent the AP seeks to take this email out of context. When asked at his deposition about the truthfulness of this statement in this email, Juncal

responded: “Well, if we were going to use just his—you know, use their archival photographs, I guess it was more that where we have an understanding that we need to get clearance from the photographers.” [Ex. BB (Juncal Depo. at 214:22-215:6).] Juncal further explained that One 3 Two was considering using the photographs themselves as opposed to Fairey’s illustrations based on those photographs. [*Id.* at 216-217.]

66. Obey Clothing has itself entered into licensing agreements with various photographers. Kehoe Decl. ¶ 25, Ex. 24 (OTT000644-46; OTT000830-832); Kehoe Decl. ¶ 38, Ex. 37 (OTT000833-35).

Response: Disputed as not supported by competent evidence. Exs. 24 and 37 to the Kehoe Decl. are not properly authenticated. Furthermore, the documents in question are more accurately titled “Collaboration Agreements” given the larger role that the photographer played in the creation of the images. Kehoe Decl. ¶ 25, Ex. 24 (OTT000644-46; OTT000830-832); Kehoe Decl. ¶ 38, Ex. 37 (OTT000833-35). [Ex. CC (Broders Depo. 105:8-13; 143:22-145:23;163:10-164:1; 191:20-192:4).]

67. In October 2008, Obey Clothing entered into a license agreement with Al Rockoff to use Mr. Rockoff’s photographs and Mr. Fairey’s works based on the photographs on t-shirts and related merchandise. Kehoe Decl. ¶ 25, Ex. 24 (OTT000644-46; OTT000830-832).

Response: Disputed as not supported by competent evidence. Ex. 24 to the Kehoe Decl. is not properly authenticated. Furthermore, the document in question is more accurately titled “Collaboration Agreement” given the larger role that the photographer played in the creation of the images. Kehoe Decl. ¶ 25, Ex. 24 (OTT000644-46; OTT000830-832). [Ex. CC (Broders Depo. 143:22-145:23).] It is also immaterial and irrelevant given that this collaboration agreement was entered into months after Fairey created the Obama Image.

68. In October 2008, Obey Clothing entered into a license agreement with Martha Cooper to use Ms. Cooper's photographs and Mr. Fairey's works based on the photographs on t-shirts and related merchandise. Kehoe Decl. ¶ 38, Ex. 37 (OTT000833-35); Kehoe Decl. ¶ 35, Ex. 34 (C. Broders Dep. (Mar. 16, 2010) 157:7-21).

Response: Disputed as not supported by competent evidence. Ex. 37 to the Kehoe Decl. is not properly authenticated. Furthermore, the document in question is more accurately titled "Collaboration Agreement" given the larger role that the photographer played in the creation of the images. Kehoe Decl. ¶ 38, Ex. 37 (OTT000833-35); Kehoe Decl. ¶ 35, Ex. 34 (C. Broders Dep. (Mar. 16, 2010) 157:7-21). [Ex. CC (Broders Depo. 163:10-164:1).] It is also immaterial and irrelevant given that this collaboration agreement was entered into months after Fairey created the Obama Image.

69. In situations where Obey Clothing licensed the photos that Mr. Fairey used in making images for Obey Clothing's apparel products, such as with Mr. Rockoff and Mr. Friedman, Obey Clothing also gave credit and/or attribution to the photographers. Kehoe Decl. ¶ 26, Ex. 25 (Obey Clothing's website, <http://obeyclothing.com/news/?p=3292>); Kehoe Decl. ¶ 39, Ex. 38 (Obeygiant.com, <http://obeygiant.com/headlines/obey-x-public-enemy-x-glen-e-friedman-x-clothing>).

Response: Disputed as not supported by competent evidence. Exs. 25 and 38 to the Kehoe Decl. are not properly authenticated. The agreements in question are more accurately titled "Collaboration Agreements" given the larger role that the photographer played in the creation of the images. Kehoe Decl. ¶ 25, Ex. 24 (OTT000644-46; OTT000830-832); Kehoe Decl. ¶ 38, Ex. 37 (OTT000833-35). Broders testified that One 3 Two enters into licensing agreements "with particular artists that we have done collaborations with where we have agreed to pay a royalty to said artist." [Ex. CC (Broders Depo. at 105:8-13).] Broders also testified that One 3 Two had a licensing agreement with Rockoff, but not Friedman. [*Id.* at 107-109; 143:22-144:9.] It is also immaterial and irrelevant given that this collaboration agreement was entered into months after Fairey created the Obama Image.

70. On December 12, 2008, the AP licensed an image of a Palestinian woman to Amanda Fairey, the wife and business partner of Shepard Fairey, for use in a work made by Mr. Fairey. Kehoe Decl. ¶ 40, Ex. 39 (FAIREY69594-FAIREY69599).

Response: Disputed as not supported by competent evidence. Ex. 39 to the Kehoe Decl. is not properly authenticated. It is also immaterial and irrelevant given that this license was obtained months after Fairey created the Obama Image, and it was obtained by Amanda Fairey, not One 3 Two.

71. Obey Clothing reproduced that image on t-shirts and merchandise. Kehoe Decl. ¶ 35, Ex. 34 (C. Broders Dep. (Mar. 16, 2010) 130:6-138:22); DeGrave Decl. ¶ 9.



AP Photograph



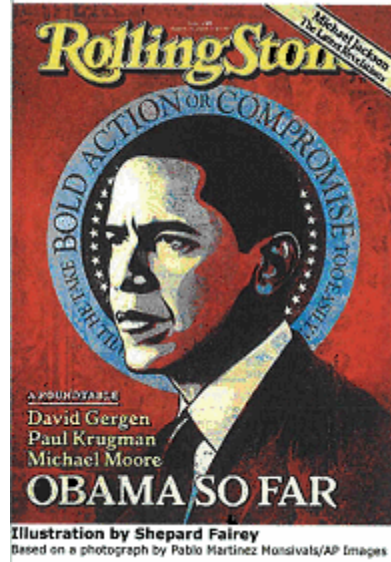
Fairey's Licensed Work



Obey Clothing's T-shirt

Response: Undisputed, but immaterial.

72. Mr. Fairey has also used AP photographs to make images of world leaders for the cover of *Rolling Stone* magazine. For example, Fairey used an AP image of Mr. Obama appearing in front of the presidential seal to make a derivative work based on the image, as pictured below. Farah [sic] Decl. ¶¶ 10, 11; Kehoe Decl. ¶ 41, Ex. 40 (AP0003209-10).



Response: Disputed as not supported by competent evidence. Ex. 40 to the Kehoe Decl. is not properly authenticated. Also disputed to the extent the term “derivative work” is intended to refer to the definition of the same under the Copyright Act and to imply that the image Fairey created was not transformative or would not have been entitled to the fair use defense. See *SimplexGrinnell LP v. Integrated Sys. & Power, Inc.*, 642 F. Supp. 2d 206, 214 (S.D.N.Y. 2009) (noting that “a derivative work by definition consists of a matter that would be infringing if it had been derived from the pre-existing work without the copyright proprietor’s consent. . .”) (quoting 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 7.16 [B][2][b] (2008)).

Also disputed as the original image created by Fairey did not have the legend that is shown at the bottom of the image above (“Illustration by Shepard Fairey; Based on a photograph by Pablo Martinez Monsivais/AP Images); that language was included within the interior of the magazine. [Ex. O (Deposition of Frank Shepard (“Fairey Depo.”) (Day 2) at 611:17-613:16).] Finally, it is also immaterial and irrelevant given that *Rolling Stone* obtained a license for the

image in question more than 18 months after Fairey created the Obama Image. [See Response to AP Statement of Undisputed Fact (“Resp. to AP SUF”) No. 73].]

73. *Rolling Stone* obtained a license on behalf of Mr. Fairey to use the image. The licensed image was featured on the cover of the August 2009 issue of *Rolling Stone* magazine with the credit, “Based on a photograph by Pablo Martinez Monsivais/AP Images.” Farah [sic] Decl. ¶ 11.

Response: Disputed. *Rolling Stone* obtained a license for itself, rather than for Fairey. Kehoe Decl., Ex. 40 (invoice directed to *Rolling Stone* for a one-time use of the photo for use in a derivative work on the magazine’s cover). It is also immaterial and irrelevant given that *Rolling Stone* obtained the license more than 18 months after Fairey created the Obama Image.

74. *Rolling Stone* magazine’s Italian edition also obtained a license from the AP for Mr. Fairey to use an AP photograph of Italian prime minister Silvio Berlusconi as the source image for the cover design of the magazine. The original source image and Mr. Fairey’s licensed derivative design are pictured below.



Response: Disputed as not supported by competent evidence. There is no evidence provided to support the statement. It is also immaterial and irrelevant given that *Rolling Stone* obtained the license from the AP months almost two years after Fairey created the Obama Image.

VI. THE OBAMA PHOTOGRAPH

75. On April 27, 2006, AP staff photographer Mannie Garcia was assigned to cover a press conference about the conflict in Darfur at the National Press Club (“NPC”) in Washington, D.C. featuring Oscar-winning actor George Clooney and then-Senator Barack Obama. Kehoe Decl. ¶ 42, Ex. 41, (Garcia Dep. (Mar. 4, 2010), Ex. 52; Kehoe Decl. ¶ 43, Ex. 42 (Garcia Dep. (Mar. 4, 2010) 29:7-31:15; 219:8-19).

Response: Undisputed.

76. At the NPC event, Mr. Garcia made a portrait photograph of then-Senator Obama that pictured Mr. Obama gazing upward and to the right against the backdrop of the American flag (the “Obama Photo”). Kehoe Decl. ¶ 42, Ex. 41 (Garcia Dep. (Mar. 4, 2010) Ex. 4).

Response: Disputed to the extent the AP suggests that Mannie Garcia’s purpose in taking a photograph of Obama was to “mak[e] a portrait” or that he make creative choices in doing so.

On April 27, 2006, Garcia had an assignment from the Associated Press to cover a news conference at the National Press Club in Washington D.C., scheduled for 12:15 p.m. on April 27, 2006. [Ex. A (Deposition of Mannie Garcia (“Garcia Depo”) 03/05/10 at 127:5-128:16).] The subject of the news conference was the actor George Clooney’s recent trip to Darfur. [*Id.* (Garcia Depo. 03/04/10 at 29:7-15; *id.* (Garcia Depo. 03/05/10 at 49:13-18).] United States Senators Sam Brownback and Barack Obama were scheduled to attend the news conference with Clooney. [*Id.* (Garcia Depo. 03/04/10 at 29:7-12.)] The press conference was one of four assignments that Garcia covered on April 27, 2006. [*Id.* (Garcia Depo. 03/04/10 at 127:5-128:22); Ex. D.]

The National Press Club function room where the press conference was held is small—roughly 50 feet long and 20 feet wide. [Ex. A (Garcia Depo. 03/05/10 at 165:2-9.)] The speakers’ table was set up along one of the long walls of the function room. [*Id.* (Garcia 03/05/10 at 162:21-163:12).] Garcia had no control over the lighting in the function room,

which was primarily lit by incandescent overhead lighting. [*Id.* (Garcia Depo. 03/05/10 at 179:10-180:8, 180:15-181:4).] Garcia brought some of his own strobes but did not use them, and he did not attempt to alter the lighting of the room. [*Id.* (Garcia Depo. 03/05/10 at 180:9-181:9, 209:17-19).]

Garcia identified and occupied what he considered the “best position” in the sector of the function room that had been reserved for photographers. [*Id.* (Garcia Depo. 03/05/10 at 172:9-20).] Other photographers subsequently took up positions around Garcia, until his sector (and the room in general) became very crowded, in large part due to the excitement caused by Clooney’s presence. [*Id.* (Garcia Depo. 03/04/10 at 29:19-30:3); *id.*(Garcia 03/05/10 Depo. at 167:2-9).] Garcia had little freedom of movement from his position because he was limited by a red “velvet cord” in front of him—marking the limit of the photographers’ sector—and by photographers behind and on both sides of him. [*Id.* (Garcia Depo. 03/05/10 at 175:2-176:20).] Garcia and the other photographers were “all on [their] knees or sitting down low” in front of the speakers’ table. [*Id.* (Garcia Depo. 03/04/10 at 35:17-24).] After Garcia and the other photographers had taken up their positions, Clooney, Brownback, and Obama entered the room and sat in seats that Garcia did not know in advance. [*Id.* (Garcia Depo. 03/05/10 at 173:3-8).]

The Darfur news conference lasted approximately 55 minutes. [Ex. D, at 7-257).] Garcia took a total of 251 photos during the Darfur news conference, the majority of which focused on Clooney alone or Clooney and one or more of the senators. [Ex. D.] Fifty of the 251 photos focus primarily or exclusively on Obama. [*Id.* at 46-47, 54-55, 116-27, 132-37, 141-46, 159-69, 189-94, 227-32.] At the time of the Darfur news conference, then-Senator Obama had not yet announced his presidential ambitions. [Ex. A (Garcia Depo. 03/05/10 at 184:9-12).]

At 12:41:38 pm, Garcia took a photograph of Obama alone (“Garcia Photo”). [Ex. D, at

164).] When taking this picture, Garcia had no control over Obama’s pose or appearance [Ex. A (Garcia Depo. 03/05/10 at 267:19-268:14)]. Garcia admitted during his deposition that he had no control over Obama’s appearance, including no control over: (1) Obama’s attire, (2) where Obama sat; (3) Obama’s poses; (4) where Obama looked; (5) where Obama fixed his eyes; (6) how Obama set his mouth; or (7) how he turned his head. [*Id.* (Garcia Depo. 03/05/10 at 267:19-268:14).] Garcia claims that he did make several creative choices:

- a. He adjusted his position slightly so that the American flag was located behind Obama’s head [Ex. A (Garcia Depo. 03/04/10 at 37:8-22)];
- b. He crouched down to accentuate the impression that Obama was looking “out” [*id.* (Garcia Depo. 03/04/10 at 39:15-40:4)]²; and
- c. When taking the Obama photo, he selected a lens aperture that would blur the background and thus create a shallow depth of field. [*Id.* (Garcia Depo. 03/04/10 at 37:23-38:15); *id.* (Garcia Depo. 03/05/10 at 242:6-14).]

Garcia has described his purpose in taking the photographs of Obama as follows: He was trying to make a “very good photograph” [*Id.* (Garcia Depo. 03/05/10 at 222:9-13)], or “the best possible photograph of this guy” [*Id.* (Garcia Depo. 03/05/10 at 242:1-5)]; he was trying to capture the “personality” [*Id.* (Garcia Depo. 03/05/10 at 222:15-17)] or “essence” of Obama [*Id.* (Garcia Depo. 03/04/10 at 35:5-16; *id.* (Garcia Depo. 03/05/10 at 336:6-12)]; he was trying to create a “classic portrait,” [*Id.* (Garcia Depo. 03/05/10 at 220:3-16, 325:10-16)]; he was trying to take “basically a clean headshot.” [*Id.* (Garcia Depo. 03/05/10 at 68:16-69:9, 219:11-220:2,

² Since Garcia was already “sitting down low” [Ex. A (Garcia Depo. 03/04/10 at 35:17-24)], it is unclear whether this choice was due to creativity or necessity.

335:5-10).] In taking the Garcia Photo, Garcia has consistently said he was not attempting to advance Obama's political ambitions. [*Id.* (Garcia Depo. 03/05/10 at 184:13-21); Ex. C.] Garcia interprets the National Press Photographers Association (NPPA) Code of Ethics as forbidding him to select or alter a photograph for the purpose of promoting a particular political candidate. [Ex. A (Garcia Depo. 03/05/10 at 188:8-16).]

A member of the NPPA, Garcia has always followed the NPPA Code of Ethics. [*Id.* (Garcia Depo. 03/05/10 at 39:1-41:19, 116:11-117:1).] In Garcia's opinion, the NPPA Code of Ethics forbids him from "posing" a photographic subject. [*Id.* (Garcia 03/05/10 Depo. at 117:19-118:22).] The Code of Ethics also forbids him from editing a photograph in any way that would "manipulate" the subject matter "in any way that can mislead viewers or misrepresent subjects." [*Id.* (Garcia Depo. 03/05/10 at 119:1-15).] In his judgment, cropping and color correction are permissible only if they produce an image that is "no less accurate" than the original. [*Id.* (Garcia Depo. 03/05/10 at 119:9-121:4).]

Shortly after the Darfur news conference, Garcia reviewed the 251 photographs he had taken and, in a matter of minutes, selected sixteen for submission to the Associated Press. [*Id.* (Garcia Depo. 03/05/10 at 250:19-251:17, 328:18-329:18); Ex. E.] The Garcia Photo was among the sixteen photographs he then submitted to the Associated Press. [*Id.*, at 17-18, 31-32; Ex. F.]

Prior to transmitting the photographs to the Associated Press, Garcia spent a few seconds editing them in minor respects. [Ex. A (Garcia Depo. 03/05/10 at 154:16-155:3).] Garcia edited the Garcia Photo by "cropp[ing]" it, removing "a little bit of the . . . shoulder and some of the stars at the top" [*id.* (Garcia Depo. 03/05/10 at 253:8-16)]; "resiz[ing]" it [*id.* (Garcia Depo. 03/05/10 at 253:17-18)]; and adjusting the color to "make sure . . . that the color was representative of what the person . . . looked like." [*Id.* (Garcia Depo. 03/05/10 at 254:5-15).]

77. A true and correct copy of the Obama Photo is pictured below.



Response: Disputed as not supported by competent evidence. There is no evidence provided to support this statement.

78. The AP owns a valid copyright registration, Registration No. VA-1-356-885, in the Obama Photo. Kehoe Decl. ¶ 54, Ex. 53 (AP0000082-95); Kehoe Decl. ¶ 48, Ex. 47 (Ltr. from W. Fisher and G. Stewart to J. Hellerstein dated December 22, 2010, 2 (“Fairey concedes that the Copyright in the [Obama Photo] is owned by the AP”)

Response: Disputed as not supported by competent evidence. Ex. 53 to the Kehoe Decl. is not properly authenticated.

79. The elements present in the Obama Photo were the result of significant creative skill and judgment exercised by Mr. Garcia in capturing Mr. Obama’s expression, pose, and other ideal qualities at a particular moment in time. Kehoe Decl. ¶ 44, Ex. 43(L. Dahlberg Dep. (Dec. 10, 2010) 17:9-18:20; 19:16-20:8; 25:2-27:5).

Response: Disputed. Laurie Dahlberg does not have foundation to discuss Garcia’s choices, and appears to be relying on Garcia’s testimony in this regard. [Ex. FF (Deposition of Laurie Dahlberg (“Dahlberg Depo.”) at 81-82 and 86-87).] Moreover, as set forth in Resp. to AP SUF No. 76, Garcia’s creative choices were limited given the constraints in which he was working, including the crowded space with limited room to move, the lack of control over Obama’s pose or appearance, and the NPAA ethical rules that prevented him from manipulating

the photograph. The Garcia Photo was also just one of 251 photos taken during a 55-minute press conference.

80. Mr. Garcia used effective political portraiture techniques in making Obama Photo, such as capturing Mr. Obama in a classic political pose to depict the then-junior Senator from Illinois in an inspiring, flattering way. Kehoe Decl. ¶ 45,; Ex. 44 (Sturken Dep. (Nov. 24, 2010); 45:20-46-24; 72:24-74:23; 106:13-110:8; 134:4-8).

Response: Disputed. Marita Sturken does not have foundation to discuss Garcia’s choices, and appears to be relying on Garcia’s deposition testimony and Dahlberg’s report in this regard. [Ex. GG (Deposition of Marita Sturken (“Sturken Depo.”) at 41-45).] Moreover, as set forth in Resp. to AP SUF No. 76, Garcia’s creative choices were limited given the constraints in which he was working, including the crowded space with limited room to move, the lack of control over Obama’s pose or appearance, and the NPAA ethical rules that prevented him from manipulating the photograph. The Garcia Photo was also just one of 251 photos taken during a 55-minute press conference.

81. Mr. Garcia portrayed Mr. Obama in the Obama Photo as appearing “presidential,” thoughtful,” “serious,” and in a “flattering light.” Kehoe Decl. ¶ 45, Ex. 44 (Sturken Dep. (Nov. 24, 2010) 45:20-46-24 (“Q: Isn’t it true, Professor Sturken, that the moment in [time] Mr. Garcia selected to make the photograph of then Senator Obama helped to depict him in this presidential way? A: Yes.”); 50:9-53:6).

Response: Disputed. Sturken does not have foundation to discuss Garcia’s choices. Moreover, as set forth in Resp. to SUF No. 76, Garcia’s creative choices were limited given the constraints in which he was working, including the crowded space with limited room to move, the lack of control over Obama’s pose or appearance, and the NPAA ethical rules that prevented him from manipulating the photograph. The Garcia Photo was also just one of 251 photos taken during a 55-minute press conference.

82. Mr. Garcia made creative choices with respect to framing the Obama Photo, the choice of lens, depth of field, moment in time he took the photograph, and Mr. Garcia's positioning to make the Obama Photo. Kehoe Decl. ¶ 45, Ex. 44 (Sturken Dep. (Nov. 24, 2010) 46:14-24; 50:25-53:6).

Response: Disputed. Sturken does not have foundation to discuss Garcia's choices. Moreover, as set forth in response to SUF No. 76, Garcia's creative choices were limited given the constraints in which he was working, including the crowded space with limited room to move, the lack of control over Obama's pose or appearance, and the NPAA ethical rules that prevented him from manipulating the photograph. The Garcia Photo was also just one of 251 photos taken during a 55-minute press conference.

83. Mr. Garcia intended to make a "portrait" that would "capture the essence of Senator Obama." Kehoe Decl. ¶ 43, Ex. 42 (Garcia Dep. (Mar. 4, 2010) 35:2-16).

Response: Disputed. Garcia has described his purpose in taking the photographs of Obama as follows: He was trying to make a "very good photograph," [Ex. A (Garcia Depo. 03/05/10 at 222:9-13)], or "the best possible photograph of this guy," [*id.* (Garcia Depo. 03/05/10 at 242:1-5)]; he was trying to capture the "personality" [*id.* (Garcia Depo. 03/05/10 at 222:15-1)], or "essence" of Obama [*id.* (Garcia Depo. 03/04/10 at 35:5-16; *id.* (Garcia 03/05/10 Depo. at 336:6-12)]; he was trying to create a "classic portrait," [*id.* (Garcia Depo. 03/05/10 at 220:3-6, 325:10-6)]; he was trying to take "basically a clean head shot." [*Id.* (Garcia Depo. 03/05/10 at 68:16-69:9, 219:11-220:2, 335:5-10).] In taking the Garcia Obama photograph, Garcia has consistently said he was not attempting to advance Obama's political ambitions. [*Id.* (Garcia Depo. 03/05/10 at 184:13-21; Ex. C.) Garcia interprets the NPAA Code of Ethics as forbidding him to select or alter a photograph for the purpose of promoting a particular political candidate. [Ex. A. (Garcia Depo. 03/05/10 at 188:8-16).]

Also disputed due to questions about Garcia’s credibility. On May 14, 2010, the AP informed the Court that it believed that Garcia had spoliated evidence and lied about doing so during his deposition for the purpose of furthering his claim. [Ex. WW.] Having accused Garcia of lying, the AP can hardly rely on his self-serving testimony to support its summary judgment motion. *See Piesco v. Koch*, 12 F.3d 332, 343 (2d Cir. 1993) (court must make all credibility assessments *against* moving party, and summary judgment may be granted “only if . . . a reasonable juror would have been *compelled* to accept the view of the moving party” notwithstanding the adverse credibility determinations). Garcia’s credibility itself establishes a triable issue such that summary judgment cannot be granted.

84. Mr. Garcia described his process in making the Obama Photo:

I looked up and I saw, I saw a nice image, and it was — but I was — I had to get myself over, because the background was so — I didn’t like the background. Part of the flag was in it and part of the wall paper was in it, and I, I saw something. I just had to move my way over, and I did move my way over to the right a little bit. I changed the lens. I kept looking for an angle. I had made a couple of shots . . . and then all of a sudden it just happened. It was there. He moved himself. I moved myself into position. I waited for the eyes and then made it.

Kehoe Decl. ¶ 43, Ex. 42 (M. Garcia Deposition (Mar. 4, 2010) 35:20-36:19).

Response: Disputed. As set forth in Resp. to SUF No. 76, Garcia’s creative choices were limited given the constraints in which he was working, including the crowded space with limited room to move, the lack of control over Obama’s pose or appearance, and the NPAA ethical rules that prevented him from manipulating the photograph. The Garcia Photo was also just one of 251 photos taken during a 55-minute press conference.

Also disputed due to questions about Garcia’s credibility, which establishes a triable issue such that summary judgment cannot be granted, as discussed in greater detail in Resp. to SUF No. 83.

85. The moment in time that Mr. Garcia selected for making the Obama Photo was his creative decision. Kehoe Decl. ¶ 43, Ex. 42 (M. Garcia Deposition (Mar. 4, 2010) 37:8-40:18).

Response: Disputed. As set forth in Resp. to SUF No. 76, Garcia’s creative choices were limited given the constraints in which he was working, including the crowded space with limited room to move, the lack of control over Obama’s pose or appearance, and the NPAA ethical rules that prevented him from manipulating the photograph. The Garcia Photo was also just one of 251 photos taken during a 55-minute press conference.

Also disputed due to questions about Garcia’s credibility, which establishes a triable issue such that summary judgment cannot be granted, as discussed in greater detail in Resp. to SUF No. 83.

86. Mr. Garcia also decided what equipment to use to make the Obama Photo. Kehoe Decl. ¶ 43, Ex. 42 (M. Garcia Deposition (Mar. 4, 2010) 38:16-39:10 (“And so yes, I was able to take off a piece of glass and put on another one that suited the purpose for what I wanted.”)).

Response: Undisputed that Garcia testified as indicated. Disputed due to questions about Garcia’s credibility, which establishes a triable issue such that summary judgment cannot be granted, as discussed in greater detail in Resp. to SUF No. 83.

87. Mr. Garcia made creative decisions about the composition of the Obama Photo. Kehoe Decl. ¶ 43, Ex. 42 (M. Garcia Deposition (Mar. 4, 2010) 39:15-40:4 (“With regard to the composition . . . I’m waiting on the subject to give me an expression, and then I lowered myself so that it would appear as if I’m looking up, I’m looking up to the subject so the subject looks as if they’re looking out.”)).

Response: Disputed. As set forth in Resp. to SUF No. 76, Garcia’s creative choices were limited given the constraints in which he was working, including the crowded space with limited room to move, the lack of control over Obama’s pose or appearance, and the NPAA

ethical rules that prevented him from manipulating the photograph. The Garcia Photo was also just one of 251 photos taken during a 55-minute press conference.

Also disputed due to questions about Garcia's credibility, which establishes a triable issue such that summary judgment cannot be granted, as discussed in greater detail in Resp. to SUF No. 83.

88. Mr. Garcia intended at the NPC event to make photos of more than just the news of the day, which was Oscar-winning actor George Clooney's appearance at the National Press Club in Washington, D.C. to discuss the humanitarian crisis in Darfur. Kehoe Decl. ¶ 43, Ex.42, (Garcia Dep. (Mar. 4, 2010) 30:25-32:3 (Mr. Garcia testified that he went "beyond the specific event" he was covering, and worked "creatively" to capture additional images, such as the Obama Photo.).

Response: Disputed. The evidence cited only indicates that the AP "encourage[d Garcia], as a photographer, to go beyond the specific event you were attending to think creatively about what images you should make" and not that Garcia actually followed that recommendation at the NPC event. Kehoe Decl. ¶ 43, Ex.42, (Garcia Dep. (Mar. 4, 2010) 31:24-32:3.)

Garcia also wrote a caption to the photograph that states: "Senator Barack Obama . . . listens to Academy award winning actor George Clooney speaking to the media at the National Press Club . . ." [Ex. A (Garcia Depo. 03/04/10 at 298:11-22).] If the photograph were intended to be "more than just the news of the day," it is unclear why he wrote that particular caption, which continued to identify the photo. See Kehoe Decl., Ex. 45, AP 000820, listing as caption of the Garcia Photo: "***FILE** Senator Barak [sic] Obama, D-Ill., listens to academy awarding[sic]-winning actor George Clooney speaking to the media at the National Press Club in Washington, Thursday, April 27, 2006, to call attention to the critical situation in the Darfur region of Sudan." It is also the practice of AP Images to link each photograph with the story for

which it was taken, except for a collection of historical photographs. [Ex. G (Deposition of Jim Gerberich (“Gerberich Depo.”) 09/25/09 at 48:3-19).]

Also disputed due to questions about Garcia’s credibility, which establishes a triable issue such that summary judgment cannot be granted, as discussed in greater detail in Resp. to SUF No. 83.

89. Mr. Garcia was aware when he made the Obama Photo that it would be sent to the AP Images archive of photographs for later licensing and use by AP’s customers. Kehoe Decl. ¶ 43, Ex. 42 (M. Garcia Dep. (Mar. 4, 2010) 34:1-9)).

Response: Disputed. The testimony cited only indicates that, at the time he took the photo, Garcia was aware that the photo would be sent to AP Images. His testimony does not indicate that he was also aware at the time what AP Images would do with the Photo, as that question was asked in the present tense. Kehoe Decl. ¶ 43, Ex. 42 (M. Garcia Dep. (Mar. 4, 2010) 34:1-4 (Q: “And *do* you understand that The AP licenses the photos in its archive for all types of uses? A: Yes.” (emphasis added).)

Also disputed due to questions about Garcia’s credibility, which establishes a triable issue such that summary judgment cannot be granted, as discussed in greater detail in Resp. to SUF No. 83.

90. While photos of George Clooney that were taken by Mannie Garcia at the NPC event covered the events of the day, Mr. Garcia’s Obama Photo was a portrait of Barack Obama that did not. Kehoe Decl. ¶ 45, Ex. 44 (Sturken Dep. (Nov. 24, 2010) 57:1-25).

Response: Disputed. Sturken lacks foundation to testify as to Garcia’s intent. Garcia also wrote a caption to the photograph that states: ““Senator Barack Obama . . . listens to Academy award winning actor George Clooney speaking to the media at the National Press Club”” [Ex. A (Garcia Depo. 03/04/10 at 298:11-22).] If the photograph was intended to be “more than just the news of the day,” it is unclear why he wrote that particular caption, which

continued to identify the photo. *See* Kehoe Decl., Ex. 45, AP 000820, listing as caption of the Garcia Photo: “**FILE** Senator Barak [sic] Obama, D-Ill., listens to academy awarding[sic]-winning actor George Clooney speaking to the media at the National Press Club in Washington, Thursday, April 27, 2006, to call attention to the critical situation in the Darfur region of Sudan.”

Also disputed due to questions about Garcia’s credibility, which establishes a triable issue such that summary judgment cannot be granted, as discussed in greater detail in Resp. to SUF No. 83.

91. The Obama Photo has been used by the AP and its members and customers from the time it was made in 2006 through the present for stories unrelated to the April 27, 2006 NPC event, including stories on the following subjects:

- The African-American vote in Ohio in advance of the 2008 presidential campaign.
- Mr. Obama’s five-nation tour of Africa in August 2006.
- Singer-songwriter Neil Young’s song mentioning Mr. Obama in the lyrics in May 2006.

Kehoe Decl. ¶ 46, Ex. 45 (AP0000816; AP0000818; AP0000820; AP0011058 (tab one from the AP’s download report showing the use of the Obama Photo by AP’s customers)).

Response: Disputed as not supported by competent evidence. Ex. 45 to the Kehoe Decl. is not properly authenticated.

VII. SHEPARD FAIREY’S INFRINGEMENT OF THE AP’S COPYRIGHT IN THE OBAMA PHOTO

92. Mr. Fairey began discussing the possibility of making a poster for the Obama presidential campaign in October 2007. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 34:12-19 (“Q: When was the first time you had any discussions with anyone about the possibility of doing artwork for the campaign? A: The first time I think was in October of ‘07.”)).

Response: Undisputed.

93. On January 22 or 23, 2008, Mr. Fairey searched on the Internet using Google Images, which is an Internet search engine for images, for a suitable photograph of Mr. Obama that Mr. Fairey could use to make a poster. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 46:22-47:13; 79:16-23; 156:10-13).

Response: Undisputed.

94. In a May 18, 2008 Washington Post interview, Mr. Fairey stated that he was looking for an image that portrayed Mr. Obama as “presidential.” Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 119:19-120:8); Kehoe Decl. ¶ 17, Ex. 16 (S. Fairey Dep. Ex. 13); Docket # 54 (Fairey’s Amended Answer to Counterclaims (Nov. 12, 2009) ¶ 127). With regard to the source image, Mr. Fairey also stated in the interview:

I wanted strong, I wanted wise, but not intimidating . . . He is gazing off in to the future, saying “I can guide you.”

Id.

Response: Disputed as not supported by competent evidence. Ex. 16 to the Kehoe Decl. is not properly authenticated. Furthermore, at his deposition, Fairey testified that (1) he did not explicitly say to the writer that he was looking for a photograph that looked “presidential,” but that it was the writer’s interpretation, and (2) the references above could have been with regard to the Obama Image (and what Fairey wanted it to be) as opposed to what he was looking for with regard to the reference photograph. [Ex. O (Fairey Depo. 03/16/10 at 119:5-120:23).]

95. Mr. Fairey testified about “what struck [him] about the photo”:

But what struck me about the photo wasn’t the context of Darfur panel in 2006. It was the way that Obama was looking the angle. There are a lot of different historic photos of people like John F. Kennedy, the famous Korda Che Guevara photo that have this feeling of the subject knowing what lies in the future, having some sort of wisdom, and it’s a specific angle of the gaze, and that was really what struck me about the photo.

Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 140:20-141:11); Kehoe Decl. ¶ 17, Ex. 16 (S. Fairey Dep. Ex. 18).

Response: Disputed. The above “testimony” is actually a quote from an interview of Fairey on February 26, 2009, which the AP’s counsel read into the record and inquired as to whether Fairey had made that statement and whether he was truthful at the time he did so. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 140:16-141:13).

Also disputed as not supported by competent evidence. Ex. 16 to the Kehoe Decl. is not properly authenticated.

96. Mr. Fairey testified that he reviewed approximately 200 images of Barack Obama before choosing the Obama Photo for its particular qualities. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 98:19-99:21).

Response: Disputed insofar as it mischaracterizes Fairey’s testimony. In selecting the Obama Photo, Fairey first searched online to find a reference photograph with “a sort of wise looking into the distance feel and . . . a sort of three-quarter view.” [Ex. O (Fairey Depo. 03/18/10 at 792:17-793:24).] The “three-quarter[] pose” and “gaze towards the horizon” constitute “conventions and ideals in political portraiture.” [Ex. PP, at ¶ 13).] Fairey located approximately 200 potential reference photographs [Ex. O (Fairey Depo. 03/18/10 at 795:11-15)], which he narrowed to a pool of approximately six to eight “finalists,” [*Id.* (Fairey Depo. 03/18/10 at 684:6-16; *id.* (Fairey Depo. 03/28/10 at 23:11-17)], each of which depicted Obama in a “three-quarters” pose. [Exs. R-V; Ex. NN, at ¶ 10).]

On January 23, 2008, Fairey experimented with each of the “finalists” in Adobe Photoshop by “play[ing] with the contrast of the image to see if when just converted to black-and-white all the areas go either solid white or solid black, whether I would begin to see the gist of an iconic image that I would then illustrate.” [Ex. O (Fairey Depo. 03/18/10 at 806:15-20).] Fairey concluded the Garcia Photo yielded appropriate results so that it could serve as a reference. [*Id.* (Fairey Depo. 03/18/10 at 712:6-713:5).]

97. Mr. Fairey testified that the Obama Photo was a “strong portrait.” Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Depo. (Mar. 16, 2010) 162:15-163:26).

Response: Undisputed.

98. Fairey’s visual studies expert, Professor Sturken, testified that the Obama Photo does not communicate, or report on, the 2006 press conference about Darfur attended by George Clooney. Kehoe Decl. ¶ 45, Ex. 44 (M. Sturken Dep. (Nov. 24, 2010) 57:10-25).

Response: Disputed. Sturken’s opinion is not relevant to the “message” of Garcia’s Photo. Also, see Kehoe Decl., Ex. 45, AP 000820, listing as caption of the Garcia Photo: “**FILE** Senator Barak [sic] Obama, D-Ill., listens to academy awarding[sic]-winning actor George Clooney speaking to the media at the National Press Club in Washington, Thursday, April 27, 2006, to call attention to the critical situation in the Darfur region of Sudan.”

99. The images that Mr. Fairey considered but rejected as source images did not possess the qualities that Mr. Fairey was looking for. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 202:17-206:24).

Response: Undisputed.

100. Specifically, Mr. Fairey testified that he downloaded the following images to his computer, which he considered, but rejected, as possible source images. Id.



A



B



C



D

Response: Disputed as not supported by competent evidence. The images are not included in the evidence cited.

101. For example, Mr. Fairey testified that he rejected image A in paragraph 80 because Mr. Obama’s “mouth being open made him look a little bit unsure” and because Mr. Fairey “didn’t think it would work as well” as the Obama Photo. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 203:5-12).

Response: Disputed. Fairey testified that he “didn’t think it would work as well for my purposes.” Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 203:5-12). He did not compare it to the Garcia Photo. Also disputed as not supported by competent evidence. There is no evidence to indicate which image Fairey is referring to in his testimony.

102. Mr. Fairey also testified that he rejected image B in paragraph 80 because of the “same issue with his mouth being open and maybe how dark it is.” Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 204:18-205:3).

Response: Disputed as not supported by competent evidence. There is no evidence to indicate which image Fairey is referring to in his testimony.

103. In addition, Mr. Fairey testified that he did not use image C in paragraph 80 because it did not portray Mr. Obama’s “demeanor” as well as the Obama Photo and because Mr. Obama “looked a little bit grumpy.” Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 205:4-24).

Response: Disputed as not supported by competent evidence. There is no evidence to indicate which image Fairey is referring to in his testimony.

104. Regarding image D in paragraph 80, Mr. Fairey did not use that image “[m]ostly because of his mouth being open.” Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 206:5-14).

Response: Disputed as not supported by competent evidence. There is no evidence to indicate which image Fairey is referring to in his testimony.

105. The images that Mr. Fairey considered, but rejected, for his poster were among the documents that he deleted in the course of this lawsuit. Kehoe Decl. ¶ 47, Ex. 46 (Ltr. from A. Falzone to D. Cendali et al. (Oct. 9, 2009) (Fairey’s amended pleadings “reflect that Plaintiffs no longer contend that the Clooney Photograph was used in the creation of the Obama Hope

poster. Nor do Plaintiffs deny that the Obama Photo was used in the creation of the Obama Hope poster.”).

Response: Disputed insofar as the evidence cited does not support the fact. Also, irrelevant.

106. Ultimately, Mr. Fairey chose the Obama Photo because it depicted Mr. Obama as “presidential,” “dignified,” “serious,” with a “sense of contemplation” and in a “flattering” way. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 103:22-104:13; 109:19-110:4; 138:24-139:13).

Response: Disputed; Fairey testified that he chose the Garcia Photo because it provided “a good starting point for me to put these qualities across in the poster.” Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 104:6-22).

107. Another reason that Mr. Fairey chose the Obama Photo was because of the “way the light fell on Senator Obama’s face.” Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 104:23-105:17).

Response: Disputed; misstates testimony. Fairey testified that: “One of the other reasons [for choosing the Garcia Photo] is that I was interested in breaking the face down into color planes that would allow me to use the colors I wanted, red, white, blue, cream, sort of a merging of a patriotic color way with my typical color way my audience would know of my work. And some aspects of the lighting of the image were, with some manipulation, a good starting point to create an illustration in the style with the colors working the way I wanted them to.” Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 104:23-105:17).

108. Professor Sturken, Fairey’s visual studies expert, testified that Mr. Garcia’s use of the three-quarter pose technique in the Obama Photo helps portray Mr. Obama as a “strong leader” and “connotes leadership, inspiration and forward-thinking,” which are also qualities that Mr. Fairey incorporated into the Obama Image. Kehoe Decl. ¶ 45, Ex. 44 (Sturken Dep. (Nov. 24, 2010) 58:3-61:13).

Response: Disputed. Sturken’s opinions are irrelevant.

109. Professor Sturken testified that Mr. Garcia’s decision to depict Mr. Obama gazing toward the horizon helps portray Mr. Obama as “someone who is visionary and forward-thinking, [and] a little bit above the crowd.” Kehoe Decl. ¶ 45, Ex. 44 (Sturken Dep. (Nov. 24, 2010) 51:7-62:8). The Obama Image also portrays these qualities. Id. (Sturken Dep. (Nov. 24, 2010) 62:3-62:13).

Response: Disputed. Sturken’s opinions are irrelevant.

110. Professor Sturken testified that by showing Mr. Obama from below, Mr. Garcia helps portray Mr. Obama with “presence” and “as powerful,” which qualities are also conveyed in Mr. Fairey’s Obama Image. Kehoe Decl. ¶ 45, Ex. 44 (Sturken Dep. (Nov. 24, 2010) 50:25-53:6).

Response: Disputed. Sturken’s opinions are irrelevant.

111. Mr. Fairey admits that he downloaded the Obama Photo through Google Images and copied it to make the Obama Image. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 46:22-47:25; 79:16-23; Kehoe Decl. ¶ 48, Ex. 47 (Ltr. from W. Fisher and G. Stewart to J. Hellerstein dated December 22, 2010, at 2).

Response: Disputed. Ex. 47 to the Kehoe Decl. states, more accurately, that Fairey “used the Garcia photo as a reference work when creating the Hope poster, which is sufficient to establish ‘actual copying,’ as that phrase had been defined by the courts.” Kehoe Decl. ¶ 48, Ex. 47 (Ltr. from W. Fisher and G. Stewart to J. Hellerstein dated December 22, 2010, at 2). Also disputed because in an email dated January 26, 2009, AP employee Gregory Payan referred to the Garcia Photo as just the “inspiration” for the Obama Image—not a reproduction or exact copy. [Ex. VV (Deposition of Gregory Payan (“Payan Depo.”) Ex. 5).]

112. In making the Obama Image, the image metadata indicates that Mr. Fairey was able to make a “rough cut” of the image in 71 minutes using Adobe Illustrator and Adobe Photoshop entirely on his computer. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 231:10-233:10); Kehoe Decl. ¶ 17, Ex. 16 (S. Fairey Dep. Ex. 30).

Response: Disputed. The evidence does not support the fact. Also, disputed as not supported by competent evidence. Ex. 16 to the Kehoe Decl. is not properly authenticated.

113. A copy of the “rough cut” of the Obama Image is shown below (Kehoe Decl. ¶ 49, Ex. 48 (FAIREY100436):



Response: Disputed as not supported by competent evidence. Ex. 48 to the Kehoe Decl. is not properly authenticated.

114. Mr. Fairey copied the Obama Photo nearly verbatim. Kehoe Decl. ¶ 44, Ex. 43 (L. Dahlberg Dep. (Dec. 10, 2010) 64:10-13; 157:21-24).

Response: Disputed. Dahlberg’s opinions are irrelevant. Further, Fairey took a number of steps to create the iconic Obama Image: He first converted the color version of the Garcia Photo into grayscale, and cropped the image. [Ex. O (Fairey 03/18/10 Depo. at 713:17-714:11, 804:6-805:7); Ex. X (Deposition of Mike Essl (“Essl Depo.”) at 65:3-20).] He then took steps to make the resulting image more flattering, including brightening the areas of Obama’s chin and left eye, darkening his right ear, removing some unflattering highlights on his cheek and darkening his right cheek to create more definition. [Ex. O (Fairey Depo. 03/18/10 at 718:8-719:13, 806:5-14); Ex. RR, at ¶ 14); Ex. X (Essl Depo. at 66:6-21).] Fairey eventually created six “bitmaps,” each of which would serve as a starting point for a layer of color in the final

image. [Ex. O (Fairey Depo. 03/18/10 at 828:9-829:15); Ex. RR, at ¶ 18); Ex. X (Essl Depo. at 67:15-69:10).] He then selected four of the six bitmaps, assigned a color to each of them, and layered them in Adobe Illustrator to create a single composite sketch. [Ex. O (Fairey Depo. 03/18/10 at 722:8-723:4, 830:11-18); Ex. X (Essl Depo. at 69:12-70:24, 70:11-9, 73:12-4:3).]

Fairey printed out black-and-white copies of these bitmaps to use as a guide in his next step, which was to place them under sheets of Rubylith—a semi-transparent gelatin—and cut by hand the four images using an Exacto knife. [Ex. O (Fairey Depo. 03/18/10 at 723:4-11, 835:19-836:8); Ex. RR, at ¶¶ 25-26).] In cutting the Rubylith images, Fairey again sought to remove what he saw as imperfections in the Garcia Photo, given his goal of promoting Obama’s candidacy. In particular, Fairey:

- a. Reshaped the outlines of both of Obama’s ears to make them appear smooth and more perfectly shaped [Ex. RR, at ¶ 28)];
- b. Adjusted the intersection of the hairline above both ears to reduce the effect of the ears protruding [*id.*];
- c. Straightened the line of Obama’s nose [*id.*];
- d. Straightened the lines defining Obama’s chin and neck [*id.*];
- e. Extended the length of Obama’s torso below the lower boundary in the Obama photograph [*id.*];
- f. Smoothed and stylized Obama’s hairline [*id.*]; and
- g. Added small trapezoidal highlights to each of Obama’s eyes to give the effect of a glint of light in the eyes. [*id.*]

In all, this process of hand-cutting Rubyliths took Fairey approximately five or six hours, starting on January 23, 2008 and finishing on January 24, 2008. [Ex. O (Fairey Depo. 03/18/10 at 727:6-16, 839:5-12); *id.* (Fairey Depo 03/28/10 at 26:10-17).]

On January 24, 2008, Fairey's assistant scanned the four Rubyliths into Photoshop, which Fairey then imported into a separate computer program, Adobe Illustrator. [*Id.* (Fairey Depo. 03/18/10 at 842:4-11).] Using the Illustrator program, Fairey aligned the four scanned Rubylith layers, reconciled imperfections in their edges, and added colors to each of the layers (light blue stripes to layer 1, solid light blue to layer 2, a shade of red known as Red Pantene No. 485 to layer 3, and dark blue to layer 4). [*Id.* (Fairey Depo. 03/18/10 at 725:7-20, 843:16-23, 843:24-844:9, 875:8-876:16); Ex. RR, at ¶ 24); Ex. X (Essl Depo. at 70:6-24; 98:21-101:8).] After adding the colors to the layers, Fairey cut back some of the edges of the layers corresponding to light colors to ensure that, if two layers were misaligned in the final version, the lower of the two layers would not be visible. [Ex. O (Fairey Depo. 03/18/10 at 844:15-845:16).] Fairey then added the background colors: light blue on the left of Obama, red on the right. [Ex. P.] He further perfected the image, in keeping with his goal to promote Obama's candidacy, by:

- a. Changing the angle of Obama's head by approximately five degrees clockwise, making him more upright [Ex. O (Fairey Depo 03/18/10 at 725:21-726:4, 878:17-23); Ex. RR, at ¶ 28];
- b. Redrawing the line of Obama's right shoulder to make it appear straighter [Ex. O (Fairey Depo. 03/18/10 at 725:21-22); Ex. RR, at ¶ 28];
- c. Straightening Obama's left collar and shoulder lines [Ex. RR (Cost Report at ¶ 28)]; and

- d. Extending Obama's tie to be longer than the tie in the Garcia Obama photograph. [Ex. O (Fairey Depo. 03/18/10 at 725:21-24).]

Fairey added a version of the Obama campaign emblem to Obama's left lapel and added his distinctive "Obey" logo to the middle of the campaign emblem. [*Id.* (Fairey 03/18/10 Depo. at 879:16-21).] As a finishing touch, Fairey included the caption "PROGRESS" at the bottom of the image. [*Id.* (Fairey Depo. 03/18/10 at 879:22-880:5).] He later changed the caption to "HOPE" after the Obama campaign expressed concern with the term "PROGRESS." [*Id.* (Fairey Depo. 03/18/10 at 880:6-14).] To maximize the impact of the "Hope" caption, Fairey customized letters taken from the Futura font—making the "O" perfectly round, and stretching the other letters so that they were equal in width to the "O." [*Id.* (Fairey Depo 3/18/10 at 880:15-881:7).] On January 28, 2008, Fairey emailed the four files that would create the final version of the poster to two separate production houses (for lithography and for screen printing). [*Id.* (Fairey 03/18/10 Depo. at 850:6-14).]

Also disputed because in an email dated January 26, 2009, AP employee Gregory Payan referred to the Garcia Photo as just the "inspiration" for the Obama Image—not a reproduction or exact copy. [Ex. VV.]

115. Mr. Fairey copied nearly verbatim all of the characteristics that helped make the Obama Photo a compelling political portrait, such as the photo's pose, expression, angle, point of view, and composition. Kehoe Decl. ¶ 44, Ex. 43 (L. Dahlberg Dep. (Dec. 10, 2010) 33:15-18; 33:7-12; 37:15-18; 39:23-40:6; 59:4-9; 64:10-13; 134:14-20; 137:21-25; 157:21-24); Kehoe Decl. ¶ 45, Ex. 44 (M. Sturken Dep. (Nov. 24, 2010) 106:13-110:8).

Response: Disputed. Dahlberg's and Sturken's opinions are irrelevant. Further disputed for the reasons discussed in Resp. to SUF No. 114.

116. Mr. Fairey also copied the tiny, but important highlights, or twinkle, in Mr. Obama's left and right eyes in the Obama Photo when he made the Obama Image. Kehoe Decl. ¶ 44, Ex. 43 (L. Dahlberg Dep. (Dec. 10, 2010) 27:2-25; 101:4-23).

Response: Disputed. Dahlberg’s opinion is irrelevant. Further disputed because Fairey testified that he “added a little bit of a twinkle in the eye that I think gives it a little more of that focus of gaze.” [Ex. O (Fairey Depo. 3/18/10 at 869-70).]

117. All of the aesthetic qualities that are present in the Obama Photo — including the sense of Mr. Obama’s vision, leadership, intelligence and thoughtfulness — were used by Fairey and Obey Clothing in the making the Obama Image. Kehoe Decl. ¶ 44, Ex. 43 (L. Dahlberg Dep. (Dec. 10, 2010) 18:8-20; 26:4-27:25; 33:15-18; 36:7-12; 37:15-18; 93:13-97:23; 142:17-143:19).

Response: Disputed. Dahlberg’s opinion is irrelevant. Further disputed for the reasons discussed in Resp. to SUF No. 114.

118. Mr. Fairey testified that he was not trying to comment on or parody the Obama Photo in making the Obama Image. Kehoe Decl. ¶ 50, Ex. 49 (S. Fairey Dep. (Mar. 17, 2010) 566:1-5 (“Q; But you weren’t trying to parody or comment on the reference photo itself, right? A: That’s correct.”).)

Response: Disputed. Fairey also took issue with the question by AP’s counsel, immediately prior to the cited testimony, and testified that his purpose was for social commentary:

Q. Were you trying to do a parody or critique of Exhibit 5?

A. I think there is a difference between making a parody or critique of the original photograph as a photograph from a specific context that would give it meaning in one way. I was actually trying to use my poster for social commentary that was different than the original photograph so, no, I was not trying to parody the original, no.

Q. You wanted -- in your mind, the HOPE and PROGRESS posters you wanted to make them for purposes of social commentary, right?

A. Yes.

[Ex. O (Fairey Depo. at 565:9-25).] Moreover, Fairey's primary objective in making and distributing copies of the Obama Image was to help Obama win the Democratic nomination for President and then the general election. [Ex. O (Fairey Depo 03/18/10 at 788:4-14); Ex. Y (Deposition of Amanda Fairey ("A. Fairey Depo.") 09/18/09 at 61:9-11); Ex. Z (Deposition of Olivia Perches ("Perches Depo.") 09/23/09 at 491:4-9).] In keeping with this goal, Fairey gave away roughly 350 Progress posters and 300,000 Hope posters [Ex. O (Fairey Depo 03/18/10 at 704:118-705:3, 706:13-17)], and also allowed visitors to his website to download a free, high-resolution black-and-white version of the Progress poster to make additional "pasters"—images meant to be printed out and posted by individuals. [*Id.* (Fairey Depo 03/17/10 at 537:4-7); *id.* (Fairey Depo. 03/18/10 at 854:8-23); Ex. Z (Perches Depo. 09/23/09 at 310:721); Ex. Q.] Although Fairey sometimes charged for copies of the Hope Poster, his objective in doing so was merely to cover his out-of-pocket costs. [Ex. O (Fairey Depo. 03/18/10 at 861:10-20).] In an effort to cover the costs of producing the roughly 300,000 posters he gave away for free, Fairey sold roughly 1,250 posters from his website—for a price of either \$45 or \$35 apiece. [*Id.* (Fairey Depo. 03/18/10 at 703:21-704:7, 737:20-738:25).] Prof. William Landes, the AP's expert on economics, concedes that the price of \$35 or \$45 that Fairey charged for copies of posters was dramatically below the market price for the posters, and that Sheppard could have earned much more if he had raised the price. [Ex. AA (Deposition of William Landes ("Landes Depo.") at 265:18-266:7).] Fairey's goal in selling the Obama Images was not to earn a profit, but to break even. [Ex. O (Fairey Depo. 03/18/10 at 861:10-20; Ex. Y (A. Fairey Depo. 09/18/09 at 313:2-5; Ex. Z (Perches Depo 09/22/09 at 121:19-22).]

119. On January 30, 2008, Fairey began selling on obeygiant.com an initial run of 350 posters displaying the Obama Image (the “Obama Posters”) with the tagline “Progress,” at a price of \$45 per print. Kehoe Decl. ¶ 51, Ex. 50 (Obey Giant Art’s website, <http://obeygiant.com/headlines/obama#more-627> (posted January 25, 2008)).

Response: Disputed. The evidence does not support the fact.

120. In total, Fairey alone sold, authorized, or gave away for promotional purposes over 958,407 products bearing the Obama Image, including approximately: (i) 103,826 posters, (ii) 175,250 pasters; (iii) 12 artworks; (iv) 109,319 items of apparel; (v) 570,000 stickers; and (vi) an untold number of Internet downloads — all of which generated at least [REDACTED] in direct revenue for Fairey. Kehoe Decl. ¶ 52, Ex. 51 (“1. B&A Summary” and “3. Cash Receipt_Summary” from excel file incorporated in Fairey’s Second Supplement Responses to the AP’s Interrogatories Nos. 19 and 20); Kehoe Decl. ¶ 53, Ex 52 (Excel and PDF files incorporated in Fairey’s Second Supplement Responses to the AP’s Interrogatory No. 21); Ex. Kehoe Decl. ¶ 56, 55 (FAIREY 110219-20); Kehoe Decl. ¶ 57, Ex. 56 (FAIREY110374-75).

Response: Disputed insofar as the AP fails to include the interrogatory responses themselves and Fairey’s response to Interrogatory No. 20 and the excel file incorporated as part of that response indicate that the total expenses and costs associated with these items totaled [REDACTED] [Ex. YY (Responses to Interrogatory Nos. 19-21).]

121. The Obama Image put Mr. Fairey on the map in a new way. Kehoe Decl. ¶ 45, Ex. 44 (M. Sturken Dep. (Nov. 24, 2010) 183:17-184:6).

Response: Disputed. Sturken’s opinions are irrelevant.

122. Fairey and Obey Clothing could have licensed the Obama Photo prior to using it. See F. Degrave Decl. ¶ 17.

Response: Disputed. The evidence cited states that either Fairey or One 3 Two (Obey Clothing) could have obtained a license had they approached the AP “prior to the lawsuit being filed on February 9, 2009.” See F. Degrave Decl. ¶ 17. It says nothing about whether Fairey or One 3 Two could have obtained the license before Fairey made the Obama Image in January 2008. Furthermore, based upon the relationship between Fairey and One 3 Two in January 2008,

it was typically Fairey's responsibility to obtain any clearances that were necessary for the use of intellectual property. [Ex. BB (Juncal Depo. at 357:10-20, 368:15-369:2); Ex. CC (Broders Depo. at 101-102; 110-112; 121-122:11).]

It is also not certain that the AP would have permitted Fairey's intended use of the Garcia Photo. When licensing photographs for use as derivative works, the AP requires that the licensee submit the derivative work and obtain the AP's approval. [Ex. L (DeGrave Depo. at 921:1-24, 114:16-115:1).] The AP therefore could have rejected the Obama Image.

123. All AP images, including the Obama Photo, are distributed or licensed to the AP's members and customers with a caption that identifies the AP as the copyright owner of the work and the name of the photographer who made the image. See Gerberich Decl. ¶ 10.

Response: Undisputed, but immaterial.

124. Mr. Fairey stated in a March 4, 2009 interview that:

[w]hen I found the image I recall that it said it was an AP photo which I have acknowledged but it didn't have a name of the photographer.

...

I think I remember it being AP because maybe there was a watermark on it or something. I can't remember exactly why I remember it was AP. But there was something that alerted me to the fact that it was an AP image.

Kehoe Decl. ¶ 17, Ex. 16 (S. Fairey Dep. (Mar. 16, 2010) Ex. 26).

Response: Disputed. Fairey testified at his deposition that he was not certain that it was an AP Image, that there was no watermark on the photograph, and that "mostly my assumption that it was an AP image was based on the fact that it was a news photograph" [Ex. O (Fairey Depo. at 90:2-91:23).]

125. Mr. Fairey has claimed that he always thought that the source photo was an AP image. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 144:22-145:6).

Response: Disputed. Fairey testified at his deposition that he was not certain that it was an AP Image, that there was no watermark on the photograph, and that “mostly my assumption that it was an AP image was based on the fact that it was a news photograph” [Ex. O (Fairey Depo. at 90:2-91:23).]

126. Mr. Fairey did not publicly credit the AP as the copyright owner of the image until January 2009, shortly before filing the Complaint against the AP, amid public speculation regarding the identity of the source image. Kehoe Decl. ¶ 11, Ex. 10 (S. Fairey Dep. (Mar. 16, 2010) 98:15-20 (Q: Isn’t it true that there isn’t a single news article that you can point me to from 2008 in which you identified that it was an AP photograph? A: Other than the — from 2008, not that I know of.”))

Response: Disputed. The evidence cited only establishes that Fairey was not aware of any newspaper article from 2008 in which Fairey identified that the Garcia Photo was an AP photograph.

127. On or around March 19, 2009, Mr. Fairey deleted from his computer the working, grayscale copy of the Obama Photo that he used to make the Obama Image. See Kehoe Decl. ¶ 50, Ex. 49 (S. Fairey Dep. (Mar. 17, 2010) 390:10-395:12).

Response: Undisputed, but immaterial.

128. The original, unaltered copy of the Obama Photo that Mr. Fairey had downloaded through Google Images, and that Mr. Fairey had used to make the Obama Image, was never produced in this litigation. Kehoe Decl. ¶ 58, Ex. 57 (Answers and Objections of Fairey to AP’s First Set of RFAs (May 3, 2010), Resp. Nos. 39-40).

Response: Undisputed, but immaterial.

129. From the filing of the Complaint on February 9, 2009, Mr. Fairey falsely claimed that the source image for the Obama Image was not the Obama Photo, but a photograph of George Clooney and Barack Obama that was taken by Mannie Garcia (the “Clooney Photo”). Docket # 1 ¶¶ 29-34. The Clooney Photo is pictured below:



Clooney Photo

Response: Undisputed, but immaterial.

130. Between approximately March 19, 2009 and March 26, 2009, Mr. Fairey destroyed, or attempted to destroy, and fabricated new documents to make it appear that he had used the Clooney Photo rather than the Obama Photo to make the Obama Image. Kehoe Decl. ¶ 50, Ex. 49 (S. Fairey Dep. (Mar. 17, 2010) (390:10-395:12)).

Response: Undisputed, but immaterial.

131. On October 1, 2009, counsel for the AP sent counsel for Fairey an e-mail identifying the file paths where it believed the original source material may have been located. Kehoe Decl. ¶ 59, Ex. 58 (Eml. from C. Ray to A. Falzone (Oct. 1, 2009)).

Response: Undisputed, but immaterial.

132. On October 9, 2009, Mr. Fairey admitted that he had used the Obama Photo, as the source image. Kehoe Decl. ¶ 47, Ex. 46 (Ltr. from A. Falzone to D. Cendali et al. (Oct. 9, 2009) (Fairey's amended pleadings "reflect that Plaintiffs no longer contend that the Clooney Photograph was used in the creation of the Obama Hope poster. Nor do Plaintiffs deny that the Obama Photo was used in the creation of the Obama Hope poster."))

Response: Undisputed, but immaterial.

VIII. OBEY CLOTHING'S KNOWING INFRINGEMENT OF THE AP'S COPYRIGHT

133. On February 20, 2008, less than a month after Fairey began selling Obama Image products, Don Juncal, the largest owner of Obey Clothing, e-mailed Mr. Fairey to inquire whether Fairey had the rights to use the Obama Image on t-shirts. Kehoe Decl. ¶ 60, Ex. 59 (OBCL00001-2).

Response: Disputed as not supported by competent evidence. Ex. 59 to the Kehoe Decl. is not properly authenticated. Also disputed inasmuch as Juncal was asking Fairey whether he had clearance from *the Obama camp* to put the image on t-shirts, given that One 3 Two's primary concern was ensuring that President Obama and his campaign were okay with the image. Kehoe Decl. ¶ 60, Ex. 59 (OBCL00001-2). [Ex. BB (Juncal Depo. at 82:11-86:5).]

134. In his February 20, 2008 e-mail, Mr. Juncal told Mr. Fairey that “[J]udging from the response to the [Obama Posters]” using the Obama Image on t-shirts “might be a good idea.” Id.

Response: Disputed as not supported by competent evidence. Ex. 59 to the Kehoe Decl. is not properly authenticated.

135. In a reply e-mail, Ms. Perches of Obey Giant Art replied to Mr. Juncal that “[a]s much as we would like to, we cannot give you approval to do this for sale.” Id.

Response: Disputed as not supported by competent evidence. Ex. 59 to the Kehoe Decl. is not properly authenticated.

136. In a February 26, 2008 e-mail, Mr. Juncal told Mr. Fairey that clothing distributor Upper Playground was selling t-shirts bearing the Obama Image with Mr. Fairey's permission and stating that “[t]his is unfortunate since we think this is the exact kind of thing OBEY Clothing could get behind . . . [t]his does not just affect us, we have all of our accounts, our reps, and worldwide distributors to address with why this in not part of the OBEY program, but with a brand that hangs next to us in stores.” Id.

Response: Disputed as not supported by competent evidence. Ex. 59 to the Kehoe Decl. is not properly authenticated.

137. Shortly after Mr. Juncal's February 26, 2008 e-mail, Mr. Fairey sent an electronic copy of the Obama Image to Obey Clothing so that it could begin producing t-shirts and other apparel bearing the Obama Image (the "Obama Merchandise"). Kehoe Decl. ¶ 35, Ex. 34 (D. Juncal Dep. (Mar. 23, 2010) 103:24-104:03); Kehoe Decl. ¶ 61, Ex. 60 (OTT0013734-35); Kehoe Decl. ¶ 62, Ex. 61 (OTT0027454).

Response: Undisputed.

138. In a March 25, 2008 e-mail, Mr. Juncal wrote to Mr. Fairey, copying Chris Broders and Romeo Trinidad, asking Mr. Fairey whether Obey Clothing should sell the Obama Merchandise and "run it until it stops," stating that "[t]he concern is there are so many Obama tees out there that your tee should be the seminal one for the people." Kehoe Decl. ¶ 63, Ex. 62 (OTT0026284).

Response: Disputed as not supported by competent evidence. Ex. 62 to the Kehoe Decl. is not properly authenticated. Also disputed because Juncal testified that not all of One 3 Two's accounts wanted to buy the Obama Merchandise, [REDACTED]

[REDACTED]

[REDACTED] [Ex. BB (Juncal Depo. at 387:19-388:5).]

139. In the March 25, 2008, e-mail, Mr. Juncal also told Mr. Fairey that:

[We are] concerned ... that if we sold it to Urban [Outfitters] and the photographer came at Urban, that could open other legal issues.

Kehoe Decl. ¶ 63, Ex. 62 (OTT0026284).

Response: Disputed as not supported by competent evidence. Ex. 62 to the Kehoe Decl. is not properly authenticated. Disputed insofar as Juncal testified that he was more concerned about what Obama's campaign would say at the time and that Olivia Perches had given him the impression that there could be potential legal issues because they did not know who the photographer was. [Ex. BB (Juncal Depo. at 97:8-102:13).] Broders also testified that "it was never about the rights of the photographer as much as it was about the rights of that public image of Obama." [Ex. CC (Broders Depo. at 90:6-92:10).]

140. By March 25, 2008, Mr. Juncal was aware of the risk that the owner of the rights in the source photo could assert a claim regarding the unauthorized use of the source photo in the Obama Image and on the Obama Merchandise. Kehoe Decl. ¶ 63, Ex. 62 (OTT0026284).

Response: Disputed as not supported by competent evidence. Ex. 62 to the Kehoe Decl. is not properly authenticated. Disputed insofar as Juncal testified that he was more concerned about what Obama's camp would say at the time and that Olivia Perches had given him the impression that there could be potential legal issues because they did not know who the photographer was. [Ex. BB (Juncal Depo. at 97:8-102:13).] Broders also testified that "it was never about the rights of the photographer as much as it was about the rights of that public image of Obama." [Ex. CC (Broders Depo. at 90:6-92:10).]

141. After March 25, 2008, Obey Clothing's principals 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. ¶ 35, Ex. 34 (C. Broders Dep. (Mar. 16, 2010) 92:22-94:1; 95:4-15); Kehoe Decl. ¶ 19, Ex. 18 (D. Juncal Dep. (Mar. 23, 2010) 94:11-15).

Response: Disputed insofar as the evidence cited does not support the statement. Broders testified that he did not know whether anyone at One 3 Two had made any effort to determine who was the photographer or who owned the rights to the photograph. [Ex. CC (Broders Depo. 94:3-25).] The deposition testimony of Broders was subject to objections as to foundation and scope.

142. Obey Clothing never made any further efforts prior to this lawsuit to identify who the photographer was who made the source image or who owned the copyright in the source image. Kehoe Decl. ¶ 19, Ex. 18 (D. Juncal Dep. (Mar. 23, 2010) 104:4-18; 1057:7-14); Kehoe Decl. ¶ 35, Ex. 34 (C. Broders Dep. (Mar. 16, 2010) 94:3-25).

Response: Disputed insofar as the evidence cited does not support the statement. Broders testified that he did not know whether anyone at One 3 Two had made any effort to determine who was the photographer or who owned the rights to the photograph. [Ex. CC

(Broders Depo. 94:3-25).] The deposition testimony of Broders was subject to objections as to foundation and scope.

143. Mr. Fairey gave Obey Clothing permission to produce Obama Merchandise beginning in March 2008. Kehoe Decl. ¶ 62, Ex. 61 (OTT0027454-56); Kehoe Decl. ¶ 15, Ex. 14 (Trademark License Agreement (FAIREY61283.001-3.036)).

Response: Disputed as not supported by competent evidence. Exs. 14 and 61 to the Kehoe Decl. are not properly authenticated. Also disputed in that Fairey gave Obey Clothing permission in February 2008. One 3 Two's Sep. Stmt. No. 13.

144. Starting in April 2008 and continuing through August 2009, Obey Clothing produced, distributed, and sold more than 233,800 units of apparel featuring the Obama Image. Kehoe Decl. ¶ 64, Ex. 63 (OTT028260-13)).

Response: Disputed as not supported by competent evidence. Ex. 63 to the Kehoe Decl. is not properly authenticated. Further disputed because One 3 Two also gave away and sold at a great discount a large portion of the Obama Merchandise. [Ex. CC (Broders Decl. ¶ 13); Ex. SS.]

145. Examples of this apparel are set forth below:



Response: Disputed as not supported by competent evidence. There is no evidence cited.

146. Obey Clothing made approximately 35 different styles of the Obama Merchandise. Kehoe Decl. ¶ 65, Ex. 64 (OTT000307-24); Kehoe Decl. ¶ 66, Ex. 65 (OTT000001).

Response: Disputed as not supported by competent evidence. Exs. 64 and 65 to the Kehoe Decl. are not properly authenticated.

147. Obey Clothing's Obama Merchandise styles included t-shirts that reproduced the Obama Image without any text — i.e., without the words “Hope” or “Progress.” Kehoe Decl. ¶ 65, Ex. 64 (OTT000307-24); Kehoe Decl. ¶ 67, Ex. 66 (OTT013765).

Response: Disputed as not supported by competent evidence. Exs. 64 and 66 are not properly authenticated.

148. Obey Clothing's Obama Merchandise styles included t-shirts and hooded sweatshirts that reproduced the Obama Image without the Obama Image's text or its red-white-and-blue color scheme — i.e., styles that were in black and white and without the words “Hope” or “Progress.” Kehoe Decl. ¶ 65, Ex. 64 (OTT000307-24); Kehoe Decl. ¶ 68, Ex. 67 (OTT018910).

Response: Disputed as not supported by competent evidence. Exs. 64 and 67 to the Kehoe Decl. are not properly authenticated.

149. Obey Clothing's Obama Merchandise styles included t-shirts that reproduced, in both color and black and white, Mr. Fairey's Yes We Did illustration that he which made using the Obama Image after the 2008 presidential election. Kehoe Decl. ¶ 65, Ex. 64 (OTT000307-24); Kehoe Decl. ¶ 69, Ex. 68 (OTT021318).

Response: Disputed as not supported by competent evidence. Exs. 64 and 68 to the Kehoe Decl. are not properly authenticated.

150. Obey Clothing's sales of the Obama Merchandise generated approximately [REDACTED] in revenue. Kehoe Decl. ¶ 64, Ex. 63 (OTT028260); Kehoe Decl. ¶ 66, Ex. 65 (OTT000001).

Response: Disputed as not supported by competent evidence. Exs. 63 and 65 to the Kehoe Decl. are not properly authenticated. Also disputed to the extent the AP suggests that One 3 Two had a primarily commercial motive. One 3 Two did not intend to use this design to create any merchandise. [Juncal Decl., ¶ 5; Ex. BB (Juncal Depo. at 79:23-80:16).] While some of the

founders of One 3 Two supported Barack Obama in his run for the presidency, they did not want to profit from his candidacy or create an appearance that they hoped to do so. [Juncal Decl., ¶ 5; Ex. BB (Juncal Depo. at 80:8-80:16).] However, other apparel manufacturers began using the Obama Image for t-shirts, even though such use was in violation of One 3 Two's exclusive license agreement with Obey Giant, and One 3 Two was asked by one of its largest customers—the retail store Urban Outfitters—to create t-shirts with the Obama Image for Urban Outfitters to sell. [Juncal Decl., ¶ 5; Ex. BB (Juncal Depo. at 80:2-81:9).] After discussing the issue with Fairey and his companies, One 3 Two decided to create t-shirts and other items with the Obama Image (the “Obama Merchandise”) and to donate as much of the profits generated by the sales of that merchandise to support the Obama campaign. [Juncal Decl., ¶ 5; Broders Decl., ¶ 12.] Although sales of Obama Merchandise were substantial, and generated profits for One 3 Two, One 3 Two intended from the outset to use as much of the profit it made on the Obama Merchandise to support Obama's candidacy. [Juncal Decl., ¶ 5; Broders Decl., ¶¶ 9 & 12.] Between March and November 2008, One 3 Two used at least [REDACTED] of its profits from the Obama Merchandise for projects to promote Obama's bid for the presidency. [Broders Decl., ¶ 13.] These donations included creating window installations using the Obama Image, purchasing advertisements in magazines featuring the Obama Image, supplying funds for the creation of posters and stickers featuring the Obama Image, and giving away the Obama Merchandise at no cost. [Broders Decl., ¶ 13; Ex. CC (Broders Depo. at 86:3-18; 209:20-210:21).]

151. [REDACTED] Approximately 70 percent of Obey Clothing's sales of Obama Merchandise, or [REDACTED] was based on black-and-white styles. Kehoe Decl. ¶ 66, Ex. 65 (OTT000001).

Response: Disputed as not supported by competent evidence. Ex. 65 to the Kehoe Decl. is not properly authenticated.

152. The sales and distribution of the Obama Merchandise increased awareness of Obey Clothing and the “Obey” brand. Kehoe Decl. ¶ 70, Ex. 69 (A. Van Berckelaer [sic] Dep. (Aug. 26, 2010) 365:22-367:15); Kehoe Decl. ¶ 24, Ex. 23(A. Van Berckelaer [sic] Dep. (Mar. 11, 2010) 257:10-22).

Response: Disputed as not supported by competent evidence. The AP relies on the testimony of One 3 Two’s accountant, who was not designated to discuss these issues and lacked foundation to do so. The testimony cited is subject to evidentiary objections based on foundation and being outside the scope of the accountant’s designation. [Ex. DD (Deposition of Adam Van Berckelaer 03/11/10 at 257:2-6).] Also disputed because Juncal testified that not all of One 3 Two’s accounts wanted to buy the Obama Merchandise, [REDACTED]
[REDACTED]
[REDACTED] [Ex. BB (Juncal Depo. at 387:19-388:5).]

153. In 2008, Obey Clothing’s owners received over [REDACTED] in distributions of profits, up from [REDACTED] in 2007. Kehoe Decl. ¶ 71, Ex. 70 (OTT028248-53); Kehoe Decl. ¶ 72, Ex. 71 (OTT028242-47).

Response: Disputed as not supported by competent evidence. Exs. 70 and 71 to the Kehoe Decl. are not properly authenticated.

154. In 2009, Obey Clothing owners received over [REDACTED] in distributions of profits. Kehoe Decl. ¶ 23, Ex. 22 (OTT028254-59).

Response: Disputed as not supported by competent evidence. Ex. 22 to the Kehoe Decl. is not properly authenticated.

155. Obey Clothing continued selling Obama Merchandise until August 2009, approximately six months after Fairey filed this action. Kehoe Decl. ¶ 64, Ex. 63 (OTT0028260-73).

Response: Disputed as not supported by competent evidence. Ex. 63 to the Kehoe Decl. is not properly authenticated.

156. Obey Clothing never sought a license from the AP for the sale or distribution of the Obama Merchandise. Kehoe Decl. ¶ 35, Ex. 34 (C. Broders Dep. (Mar. 16, 2010) 119:4-120:9).

Response: Disputed. The evidence does not support the fact.

157. Obey Clothing never sought a license for the Obama Photo. Id.

Response: Disputed. The evidence does not support the fact.

158. Obey Clothing never credited the AP or photographer Mannie Garcia as the author or owner of the source image. Kehoe Decl. ¶ 35, Ex. 34 (C. Broders Dep. (Mar. 16, 2010) 119:4-120:9); Kehoe Decl. ¶ 65, Ex. 64 (OTT000307-24); Kehoe Decl. ¶ 73, Ex. 72 (OBCL00182-216).

Response: Disputed. The evidence does not support the fact. Also disputed as not supported by competent evidence. Exs. 64 and 72 to the Kehoe Decl. are not properly authenticated. Also disputed because once Garcia was identified as the photographer, Fairey called Garcia and offered to credit him as the photographer. [Ex. A (Garcia Depo. 03/04/10 at 51:12-52:8).]

IX. FAIREY AND OBEY CLOTHING'S USE OF THE OBAMA PHOTOGRAPH HARMED THE AP

159. Over the past several years, the news industry has faced sharp declines in revenue, in large part due to the rise of online news. Ake Decl. ¶ 7.

Response: Undisputed, but immaterial.

160. Online news generates far less revenue than the printed news because the advertising rates for online news are much lower. Ake Decl. ¶ 7.

Response: Undisputed, but immaterial.

161. To adjust for declining revenue, U.S. news outlets have had to cut back on their newsgathering operations, including closing domestic and foreign bureaus. Ake Decl. ¶ 8.

Response: Undisputed, but immaterial.

162. The Washington Post, for example, closed its last domestic bureaus in November 2009. Similarly, many major U.S. newspapers, including the Baltimore Sun, the Boston Globe, the Chicago Tribune, Newsday, and the Philadelphia Inquirer, as well as magazines such as BusinessWeek, and Time, have closed some or all of their U.S. and foreign bureaus. Ake Decl. ¶ 9.

Response: Undisputed, but immaterial.

163. Thus, many news organizations depend on the AP's presence throughout the U.S. and around the world to report the news. Ake Decl. ¶ 10.

Response: Undisputed, but immaterial.

164. The AP has lost licensing revenue from Fairey's and Obey Clothing's unlicensed uses of the Obama Photo. Dale Decl. ¶¶ 21-22; Kehoe Decl. ¶ 2, Ex. 1 (K. Dale Dep. (Mar. 26, 2010) 14:11-14:22 (The AP was harmed by "the fact that Mr. Fairey didn't pay a license fee to us for his copying and use of the photograph during the period that -- until now obviously. And obviously, all the merchandising and sales of various different items: posters, T-shirts."); Kehoe Decl. ¶ 74, Ex 73 (W. Landes Dep. (Dec. 8, 2010) 199:16-201:3 ("I think an additional consideration, which clearly is relevant in deciding whether licensing fees should be considered as part of the harm is whether, in fact, licensing is feasible, right. If you're an organization where the revenue primarily comes from licensing uses of your copyrighted images and you have an organization in place that facilitates that licensing, it's clear that the harm to you is, in fact, you would have got licensed this work."); 108:10-109:2 ("Mr. Fairey's unauthorized use of the Obama image cost the AP at a minimum the licensing fees it would have gotten from Mr. Fairey."); 152:13-154:10 ("[T]he harm is from the unauthorized use of the Obama photo in the Shepard Fairey poster, even, you know, some of them involve unauthorized uses of the photo, where what was reproduced was simply the photo part of the Shepard Fairey poster without the words HOPE or PROGRESS."))

Response: Undisputed that Fairey and One 3 Two did not pay licensing fees to the AP, and thus the AP did not receive those fees, but this fact is immaterial, as any licensing fee would have been minimal. As of March 30, 2010, images from the April 2006 National Press Club

event were downloaded 393 times for a revenue totaling [REDACTED] at individual license fees ranging from [REDACTED] to [REDACTED] depending on the use. [Ex. I.] Moreover, the largest licensing fee ever charged by the AP was [REDACTED] and that license involved much more expansive rights than those at issue in this case. [Ex. II (Kedrowski Depo. (Day 1) at 119:7-16), Ex. JJ.]

165. The AP has lost licensing opportunities from other potential customers as a result of Fairey and Obey Clothing's failure to credit the AP as the source image of the Obama Merchandise. Dale Decl. ¶ 23; Kehoe Decl. ¶ 2, Ex. 1 (K. Dale Dep. (Mar. 26, 2010) 14:23-15:10; 33:14-34:4); Kehoe Decl. ¶ 7, Ex. 6 (B. Sell Dep. (Dec. 2, 2010) 201:5-21 ("Shepard Fairey said publicly that basically, you know, you need to license pictures, and he's got a federal case here where he's trying to defend his not needing to license a picture. So the longer this continues, the more publicity he gets, it continues to be a perception that perhaps you don't need to license pictures from The Associated Press."); 203:6-17 ("Well, leave it as other people who will be -- as long as there is this perception -- as long as there is public perception that you don't need to license pictures, whether Shepard Fairey is saying it or whether somebody else is saying it, it's a damage to The Associated Press."); Kehoe Decl. ¶ 74, Ex. 73 (W. Landes Dep. (Dec. 8, 2010) 153:8-154:10 ("[S]ince [Mr. Fairey] didn't acknowledge that it was the Garcia photo at the outset, right, had he acknowledged . . . AP would have had an incentive to try to promote and market and they would have had the opportunity to promote and market during this interval of time where nobody could identify exactly where the photo had come from, right.")).

Response: Disputed, but immaterial. The deposition testimony of Sell does not support the fact, but instead refers to the time period after Fairey filed this lawsuit and thus it had become public knowledge that the Garcia Photo was an AP photograph. There is also no foundation for either his deposition testimony or the other evidence cited. Finally, it is immaterial as to what market harm occurred to AP Images other than harm related specifically to the market for the Garcia Photo.

166. The AP would have likely earned significant additional revenue if Fairey and Obey Clothing had licensed the Obama Photo and given the AP appropriate credit prior to this lawsuit. Dale Decl. ¶ 23; Kehoe Decl. ¶ 2, Ex. 1 (K. Dale Dep. (Mar. 26, 2010) 14:23-15:10; 33:14-34:4); Kehoe Decl. ¶ 7, Ex. 6 (B. Sell Dep. (Dec. 2, 2010) 187:9-189:15 (noting distinct harms: First, "[i]t was a very widely circulated, widely known poster, very successful. It was appearing in a lot of places and getting a lot of attention. So the fact that The Associated Press photographer and The Associated Press had been connected to it would have had a benefit to The Associated Press." Second, "[t]here would have been -- there are different kinds of benefits, there's public relations benefits like appearing on the Terry Gross show and being connected to

the show with a huge NPR audience, versus an editorial benefit which would have been specifically related to say the newspaper magazine industry being connected to the Shepard Fairey posters at an earlier time.”).

Response: Disputed, but immaterial. There is no foundation for the above testimony that the AP would have earned some intangible benefit from having been the owner of the copyright in the Garcia Photo. Also, it is immaterial as to what market harm occurred to AP Images other than harm related specifically to the market for the Garcia Photo.

167. The AP’s market for derivative works of the Obama Photo was harmed by Fairey’s and Obey Clothing’s unlicensed use of the image. Kehoe Decl. ¶ 74, Ex. 73 (W. Landes Dep. (Dec. 8, 2010) 149:13-154:18 (“[T]he total harm includes all of the uses of the unauthorized uses of the Garcia photo that was included in the works created by or licensed by Fairey. . . . Of course, there are close to, you know, one million copies, which I would call works that were derivative from the Garcia photo.”); 165:10-167:16 (“[T]he harm to the AP of permitting Mr. Fairey’s unauthorized use extends beyond its effect on the revenues that the AP could have earned by licensing the Obama image alone.”)

Response: Disputed, but immaterial. The above testimony is not competent as Landes lacks foundation. Moreover, there is evidence that the presence in the market of the Obama Image caused more people to purchase the Garcia Photo, and led to the sale of dozens of fine prints of the Garcia Photo for as much as \$1,000 a piece. [Ex. HH (Deposition of James Danziger (“Danziger Depo.”) at 65-72).] For example, the Garcia Photo has been available for download through AP Images since April 2006. [Ex. G (Gerberich Depo. at 144-146; Ex. QQ, Tabs 3 and 4).] In examining the download history of the Garcia Photo, it is apparent that the AP has earned more than double in downloads of the Garcia Photo than it did in the time period before the Obama Image was created. [Ex. H (showing reports of downloads); Ex. QQ, Tab 3 (providing download summary).]

168. The market for AP Images portfolio of images would be harmed if the unauthorized use of AP Images were to become widespread. Kehoe Decl. ¶ 74, Ex. 73 (W. Landes Dep. (Dec. 8, 2010) 168:23-169:22; 172:15-175:9 (“[T]o the extent that people could use an AP image in T-shirts, posters, calendars and so forth without paying, and particularly if they

took images that were particularly desirable, so that is a limit number of AP images, that could significantly reduce the licensing revenues AP would get and therefore reduce the incentive to maintain and continue to invest in developing the database and hiring photographers and so forth.”); 186:16-187:24 (“[A] different or special kind of case because you’re talking about an entire, the image database which is a collection of millions of images, and if you think of that as the product, right, which is something that is a very valuable product, even Shepard Fairey says how valuable it is to have all these photos at the AP image database, if you view that as the overall product, right, then clearly there is harm and injury to the overall product.”)

Response: Disputed, but immaterial. The fact is not supported by competent evidence, as Landes lacks foundation to make this statement. Nor has the AP cited to any evidence that Fairey or One 3 Two ever encouraged anyone to take content outside the context of fair use. [Ex. N (Dale Depo. at 19:20-20:18).] Moreover, the same could be said of every instance of fair use. Finally, the broader harm to the AP is immaterial—the only question is harm to the market relating to the Garcia Photo.

169. The AP lost potential revenue-generating opportunities from third-party photographers who rely on AP as sales agent because such photographers may not have understood the “body of work that our archive collection contains[,which] might have diminished the possibilities of some third parties to say, Can you be our sales agent.” Kehoe Decl. ¶ 2, Ex. 1 (K. Dale Dep. (Mar. 26, 2010) 15:11-16).

Response: Disputed, but immaterial. The fact is not supported by competent evidence, as Dale’s testimony is speculative and lacks foundation. The AP has not presented a single instance of a third-party photographer who did not contract with the AP as a result of the Obama Image. Furthermore, this is immaterial—the only question is harm to the market relating to the Garcia Photo.

170. If everyone were allowed to download and use AP Images photos without compensating the AP, it would erode the AP Images business. Dale Decl. ¶ 25.

Response: Disputed, but immaterial. The fact is not supported by competent evidence, as Dale’s declaration is conclusory, speculative, and lacks foundation. The AP has not presented a single instance of a third-party photographer who did not contract with the AP as a result of the

