

EXHIBIT WW
TO CROWTHER DECLARATION

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May 14, 2010

The Hon. Alvin K. Hellerstein
United States District Court for the
Southern District of New York
500 Pearl Street
New York, NY 10007-1312
Fax: (212) 805-7942

Re: *Shepard Fairey et al. v. The Associated Press and Mannie Garcia*,
Case No. 09-01123

Dear Judge Hellerstein:

We are counsel for Defendant-Counterclaim Plaintiff The Associated Press ("The AP") in connection with the above-referenced matter. As Your Honor learned earlier today, Intervenor-Crossclaim Plaintiff Mannie Garcia has now admitted that he engaged in deliberate spoliation by altering certain documents that he then produced to The AP in this case in December 2009. In light of the newly discovered information regarding Mr. Garcia's deliberate spoliation, which as discussed below is directly material to Mr. Garcia's claim that he owns the copyright in the photo of then-Senator Barack Obama (the "Obama Photo") at issue in this case, The AP respectfully requests that the Court (i) permit The AP to reopen Mr. Garcia's deposition and (ii) direct Mr. Garcia to amend his pleading in light of his recent admission. The AP also intends to move for sanctions against Mr. Garcia, including an adverse inference and terminating sanctions.

The Initial Set of Photos

During discovery, The AP sought documents from Mr. Garcia related to his employment with The AP, including copies of the digital photographs that he created for The AP in April and May 2006 and the photographs' corresponding metadata.¹ The photographs' metadata is

¹ See, e.g., The AP's *Subpoena Duces Tecum* to M. Garcia (May, 19, 2009), Document Request No. 12 ("All DOCUMENTS REFERRING OR RELATING TO any work you performed on behalf of or at the request of THE AP, including without limitation any DOCUMENTS REFERRING OR RELATING TO YOUR assignments on behalf of THE AP."); The AP's First Set of Requests for the Production of Documents and Things to Mannie Garcia (Jan. 22, 2010), Document Request Nos. 12 (same) and 23 ("DOCUMENTS sufficient (Continued...)

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significant to the question of whether Mr. Garcia was an employee or an independent contractor.² When a photographer transmits a photo to The AP, he or she must type in information in the photo's metadata indicating his or her own employment status. Therefore, in 2006, AP photographers, including Mr. Garcia, had to either enter "STF" for staff photographer (*i.e.*, an employee) or "STR" for stringer (*i.e.*, an independent contractor) when they transmitted photographs to The AP.

On July 8, 2009, Mr. Garcia produced his first set of documents in response to The AP's requests. This initial production contained 275 photographs, including the Obama Photo, that Mr. Garcia created for The AP at the National Press Club in Washington, D.C. on April 27, 2006 (the "National Press Club Photos"). The metadata for each of these photographs contains the "STF" designation for staff photographer and lists The AP as the owner of the copyright to the photographs. As will be detailed in The AP's motion for summary judgment, these are but two examples of the many admissions Mr. Garcia has made concerning his employment as a staff photographer with The AP and The AP's ownership of the copyright in the Obama Photo.

On August 14, 2009, after Mr. Garcia produced the National Press Club Photos, The AP filed its Answer and Cross Claim, pointing out that Mr. Garcia admitted that he was a staff photographer, and not a freelancer, by, *inter alia*, entering "STF" in the photos that he submitted to The AP. See The AP's Answer and Cross Claim (Aug. 14, 2009) ¶ 193 ("When Mr. Garcia transmitted the Obama Photo to The AP's Washington bureau . . . he entered 'STF' (*i.e.*, 'Staff') in the 'Byline Title' field, as required by The AP for all photos taken by staff photographers, rather than the 'STR' (*i.e.*, 'Stringer') designation which was used solely for photos taken by stringers (*i.e.*, freelance photographers).").

The Altered Photos

On December 23, 2009, Mr. Garcia produced to The AP a group of 4,809 photographs covering all of his assignments for The AP in 2006. Although the copies of the National Press Club Photos in this new production, including the Obama Photo, still said "STF" in the metadata, thousands of other photographs' metadata reflected a variety of other employment descriptions,

to show all photographs (including without limitation the photographs' IPTC metadata) made by YOU for commercial purposes from March 1, 2006 through June 1, 2006").

² This issue is germane because if Mr. Garcia was an employee of The AP when he made the Obama Photo -- and the overwhelming evidence will show that to have been the case -- it means that the photograph was a work for hire under copyright law and is owned by The AP.

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including "Freelance Photojournalist," "Photojournalist," "Photojournalist [sic]," "str," or in some cases, no description at all. Highly suspicious of these descriptions because they were materially different than the descriptions that appear for the same photos in The AP's files and also because they do not follow AP style or convention, counsel for The AP examined the metadata associated with the images. As a result of this investigation, The AP discovered that 3,284 of the photographs produced by Mr. Garcia in December 2009 had been modified in September 2009, just a few weeks after The AP filed its Answer and Cross Claim pointing out that Mr. Garcia admitted to being a staff photographer by entering "STF" in the metadata of the photos that he made for The AP in 2006.

Most startling about the photographs that were modified in September 2009 is that every single one of them contains an employment designation *other than* "STF." By contrast, the photographs from Mr. Garcia's initial production, which were *not* modified in September 2009, all say "STF" in the metadata. It also appears that Mr. Garcia deleted The AP's name from the copyright notice in thousands of the photographs that were modified in September 2009. It appeared to The AP that Mr. Garcia had altered the metadata to thousands of photographs that he produced in this case in an attempt to hide the fact that (i) he had admitted in each of them that he was a staff photographer for The AP and not a freelancer, and (ii) The AP was listed as the copyright owner.

The AP's Efforts To Identify The Source Of The Alterations

At Mr. Garcia's deposition on March 4, 2010, The AP asked him about the modified photographs, but he denied altering the images or the files. (Garcia Dep. 321:5-12 ("Q: Okay. Mr. Garcia, did you modify the files that you submitted to The Associated Press in this case on September 5, 2009? A: I did not. Q: Did you use Photo Mechanic on September 5, 2009, to modify the files relating to the photographs that you made for The AP? A: No, I did not."); Garcia Dep. 321:16-20 ("Q: Did you change the by-line titles and copyright notices for many of the photographs that you produced on December 23rd on September 5th of 2009? A: No.") (a true and correct copy of which is attached hereto as Exhibit A).)

The AP also asked for an explanation of why approximately three-quarters of the photographs produced by Mr. Garcia last December had a modification date of September 2009. In response, Mr. Garcia said that the modification date reflected the day that he "copied the files." (See Exhibit A, Garcia Dep. 322:16-22). But Mr. Garcia failed to explain why, if that were true, there are some photos in the December 2009 production that do not have a September 2009 modification date. (See Exhibit A, Garcia Dep. 326:25-327:8).

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During his deposition, Mr. Garcia also testified that he had not made any effort, beyond his normal practices, to preserve and maintain his electronic documents in connection with this litigation. (Garcia Dep. 306:21-307:1 (“Q: Did you do anything to preserve any of the electronic files or emails that you might have had? A: Typically I try to preserve as much information I think is important. I, like everyone else, I delete a ton of email in normal course of business.”) (a true and correct copy of which is attached hereto as Exhibit B).) During his deposition, Mr. Garcia’s counsel instructed him not to answer questions concerning whether his attorneys had instructed him to preserve his documents in connection with this litigation. (See Exhibit B, Garcia Dep. 307:2-308:2 (“Q: Did counsel ever tell to preserve all documents related to your work for The Associated Press? MR. UNDERHILL [counsel for Mr. Garcia]: I believe that that goes to the attorney/client privilege, and I instruct the witness not to answer. MS. CENDALI [counsel for The AP]: I disagree.”).)

Following the deposition, The AP raised with Mr. Garcia’s counsel on four separate occasions the issue of whether Mr. Garcia improperly altered metadata. (See, e.g., Mar. 10, 2010 E-mail from B. Kehoe to J. Shelly Attaching Example Modified Images (a true and correct copy of which is attached hereto as Exhibit C); Mar. 19, 2010 Letter from B. Kehoe to J. Shelly (a true and correct copy of which is attached hereto as Exhibit D); Mar. 30, 2010 E-mail from B. Kehoe to J. Shelly and B. Kile (a true and correct copy of which is attached hereto as Exhibit E); Apr. 6, 2010 E-mail from B. Kehoe to J. Shelley and B. Kile (a true and correct copy of which is attached hereto as Exhibit F).)

Mr. Garcia’s counsel initially agreed to investigate and respond to The AP the week of March 15th, but they failed to do so. Finally, after seven weeks of inquiries from The AP without a meaningful answer or explanation from Mr. Garcia, The AP prepared what it intended to be its portion of a joint letter to the Court regarding this issue, which it sent to Mr. Garcia on April 26, 2010. A true and correct copy of The AP’s portion of the joint letter is attached to this letter as Exhibit G.

It was only after The AP sent its portion of the joint letter to Mr. Garcia that he finally began taking any steps to address The AP’s concerns regarding the altered metadata. On Tuesday, April 27, 2010 — the day after receiving The AP’s portion of the joint letter — Mr. Garcia’s counsel informed The AP that they “expect[ed] to send [The AP] an email on the computer issue [the next day].” (April 27, 2010 E-mail from M. Underhill to B. Kehoe (a true and correct copy of which is attached hereto as Exhibit H).) However, instead of providing an explanation, Mr. Garcia’s counsel e-mailed The AP the next day merely stating, for the first time, that Mr. Garcia’s counsel had “retained a consultant to advise us regarding the IPTC metadata” issue. (See April 28, 2010 E-mail from B. Kile to B. Kehoe (a true and correct copy of which is attached hereto as Exhibit I).)

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At the same time that this exchange of correspondence was occurring, Mr. Garcia was opposing The AP's request to postpone the deadline for The AP's motion for summary judgment against Mr. Garcia because of open discovery issues — namely the unexplained alterations to the metadata in the image files. The AP had requested that the motion be rescheduled at the May 28, 2010, status conference with the Court because it believed that it was entitled to an explanation about the altered metadata — which goes to the merits of its claims against Mr. Garcia — prior to moving for summary judgment. The AP also believed that Mr. Garcia's opposition to its scheduling proposal was fueled by his desire to avoid answering further questions about the spoliation issues and to rush The AP's motion for summary judgment before the full scope of this issue was uncovered. (See April 27, 2010 Letter from D. Cendali to Judge Hellerstein (a true and correct copy of which is attached hereto as Exhibit J).)

Mr. Garcia Admits The Spoliation

As a result of The AP's efforts, on Wednesday, May 5, 2010, Mr. Garcia finally produced, for the first time, a set of 12 DVDs containing unaltered copies of his "raw" digital photos from April and May 2006. When The AP reviewed these files, it found that they included the designation "STF" for Mr. Garcia's employment status. Thus, thousands of images had designations in the employment field that were different from the corresponding files previously produced by Mr. Garcia. In a follow up meet and confer conference call later that same day, Mr. Garcia's counsel admitted that Mr. Garcia had modified the files that he had produced in December 2009. The AP's counsel stated that The AP believed Mr. Garcia had an obligation to amend his February 19, 2010 Amended Answer to Amended Cross Claims of The AP (the "Amended Answer") in this case, in which Mr. Garcia had denied The AP's allegations that he had entered the "STF" designation in the metadata for the Obama Photo. The AP's counsel also reminded Mr. Garcia's counsel that in light of the new photos and the confirmation that Mr. Garcia had altered the metadata in the photos from the December 2009 production, there appeared to be material misstatements and omissions in Mr. Garcia's deposition testimony concerning the altered metadata, as well as in other litigation papers he had submitted in the case. Mr. Garcia's counsel stated that they had not yet had a chance to discuss the altered metadata with their client, and the parties scheduled a follow-up call for Monday, May 10, 2010, which was the earliest that all counsel on the call were available to resume the discussion.

During the follow up meet and confer conference call on Monday, May 10, 2010, counsel for Mr. Garcia informed The AP that they had discussed the altered metadata further with Mr. Garcia and although they once again admitted that Mr. Garcia had altered the photos in September 2009, they denied that any amendment to his Amended Answer was necessary. Mr. Garcia's counsel asserted that although (i) The AP's August 14, 2009 Answer and Cross Claim alleged that Mr. Garcia admitted he was an AP staffer by entering "STF" in the Byline Title field

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for the Obama Photo, and (ii) Mr. Garcia had denied that allegation in his Amended Answer, claiming that The AP had itself entered that designation, his pleading was technically true, notwithstanding the spoliation. According to Mr. Garcia's counsel, an AP photo editor had provided Mr. Garcia with some sort of "template" for the metadata that would automatically fill in the "STF" designation. But that simply is not true. The AP does not provide any such template for its photographers, who are required to fill in the metadata themselves. Moreover, because in some instances the Byline Title filed for Mr. Garcia's photos from April and May 2006 included no designation at all, it is simply not credible that The AP ever provided any automatic template to Mr. Garcia as he claims. The AP believes that Mr. Garcia's pleading continues to perpetrate a fraud on the Court. Regardless, however, there is no question that Mr. Garcia gave materially false testimony at his deposition and admittedly engaged in deliberate spoliation.

During the May 10th call, Mr. Garcia's counsel also stated that he planned to address the discrepancies in his deposition testimony by submitting an errata sheet although the 30 day period for submitting errata sheets had long passed (even assuming that errata sheets were the appropriate mechanism for addressing the material misstatements in Mr. Garcia's deposition testimony regarding the altered metadata).

Yesterday, on May 13, 2010, counsel for The AP again spoke with counsel for Mr. Garcia regarding Mr. Garcia's admitted spoliation. During that call, The AP's counsel reiterated that the spoliation by Mr. Garcia was a very serious matter and that the Court should be informed of it. Counsel for Mr. Garcia indicated that they were still considering how to proceed and would contact us later in the week.

Earlier today, Mr. Garcia's counsel sent a letter to counsel for The AP, copying Your Honor, admitting that Mr. Garcia's March 4, 2010 deposition testimony was "inaccurate" and that contrary to what Mr. Garcia said in his deposition testimony, he had made certain changes to the images on the hard drive that he produced to The AP in December 2009, including changing the "STF" designation in the Byline Title field for various photos to "STR." The letter also stated counsel's belief that Mr. Garcia made at least some of the changes on September 5, 2009.

After receiving the letter from Mr. Garcia's counsel, The AP informed counsel for Mr. Garcia that it intended to submit this letter.

The AP's Proposed Motions for Sanctions And Summary Judgment

The spoliation by Mr. Garcia is the second instance of significant litigation misconduct that has come to light in this case after The AP expended significant time, effort and expense in discovering such conduct. Particularly troubling is the fact that by the time Mr. Garcia produced

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the altered documents to The AP in December 2009, all of the parties to this case as well as the Court were already well aware that Mr. Fairey had admitted to spoliation and fabrication in this case and that The AP intended to seek sanctions against Mr. Fairey as a result. Nevertheless, Mr. Garcia chose to go ahead and produce the altered documents that he had created in September 2009, rather than producing the unaltered documents that he finally provided to The AP just last week.

The AP believes that the very serious transgressions that have occurred in this case significantly undermine and call into question the integrity of the judicial process. They have also unnecessarily imposed on The AP, a not-for-profit newsgathering organization, the significant effort and expense required to discover the existence of the spoliation.

In light of Mr. Garcia's admitted spoliation and his "inaccurate" deposition testimony, The AP respectfully requests that it be permitted to reopen Mr. Garcia's deposition. Among other things, The AP would want to inquire regarding the spoliation as well as Mr. Garcia's litigation hold practices in this case.

The AP also believes that it is necessary for Mr. Garcia to amend his Amended Answer, which misleadingly asserts that The AP input the "STF" designation in the Byline Title field for the Obama Photo. The AP believes this allegation is literally false, and that Mr. Garcia himself input that information. At best, the allegation is materially misleading, particularly when taken in conjunction with Mr. Garcia's deposition testimony, as it suggests that it was The AP, and not Mr. Garcia, that altered the metadata for the Obama Photo.

Finally, The AP expressly reserves its right to move for sanctions against Mr. Garcia when it submits its motion for summary judgment dismissing his claim so that the Court may consider appropriate sanctions against Mr. Garcia, including (i) an adverse inference on the question of whether Mr. Garcia was a staff employee of The AP in April 2006, when he created the Obama Photo, and (ii) terminating sanctions dismissing his claim. *See Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 436-37 (S.D.N.Y. 2004) (granting adverse jury instruction as plaintiff had met her burden of demonstrating that defendants had knowingly failed to preserve and withheld relevant documents).

In this case, The AP believes that Mr. Garcia's spoliation warrants such sanctions, in addition to any monetary sanctions that the Court might award. The adverse inference would obviously bear directly on the question of whether Mr. Garcia created the Obama Photo as a work-for-hire, such that The AP is the owner the copyright in the photo, and thus have a direct impact on The AP's proposed motion for summary judgment and the merits of the case. If the Court were to award terminating sanctions, it would also directly impact the merits of Mr. Garcia's claim against The AP.

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While The AP recognizes that as a general matter Your Honor prefers to sequence a motion for sanctions after any dispositive motions, we believe that a different sequence is appropriate here given the highly unusual circumstances of this case. First, if The AP were limited to seeking sanctions against Mr. Garcia at the end of the case, it would effectively be denied either terminating sanctions or an adverse inference, leaving only monetary sanctions. Such sanctions are unlikely to be effective as against Mr. Garcia, who unlike other parties to this case is an individual of modest means who, as he testified at his deposition, is currently unemployed.

In addition, it is significant that The AP has been forced to litigate this case on several fronts, enforcing its copyright on the one hand against Plaintiffs and Counterclaim Defendants Shepard Fairey, Obey Giant Art, Inc., Obey Giant LLC, Studio Number One, Inc., and One 3 Two, Inc. (d/b/a Obey Clothing) ("Fairey"), and defending its ownership of the copyright on the other hand against Mr. Garcia. The cost to The AP — a not-for-profit news gathering organization based in New York City — has been tremendous. In light of the abusive tactics that multiple parties have pursued in this litigation, we believe that The AP should be permitted to seek appropriate restitution against Mr. Garcia as soon as possible. *See Cerruti 1981 S.A. v. Cerruti, Inc.*, 169 F.R.D. 573, 582-83 (S.D.N.Y. 1996) (Mukasey, J.) (defendants' attempt to fabricate documents and "prevent such fabrication from being detected" constituted a fraud on the court warranting dismissal).

Such an approach also is consistent with prior decisions from this District. For example, when presented with similar circumstances to the case here, the late Judge Schwartz allowed plaintiffs in *Scholastic, Inc. v. Stouffer*, 221 F. Supp. 2d 425 (S.D.N.Y. 2002) to move for sanctions concurrently with a motion for summary judgment. Plaintiffs in that case, who were represented in part by myself and my partner, Claudia Ray, similarly uncovered evidence of extensive spoliation, including the fabrication and alteration of seven categories of documents. Judge Schwartz decided plaintiffs' motions for sanctions and summary judgment together, granting summary judgment on plaintiffs' claims and simultaneously awarding monetary sanctions. *See id.* at 444-45. The AP believes that the same sequencing of motions is appropriate in this case.

Sincerely,


Dale M. Cendali

Enclosures

cc: All counsel of record