UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHEPARD FAIREY AND OBEY GIANT ART, INC.,

Plaintiffs,

v.

THE ASSOCIATED PRESS,

Defendant and Counterclaim Plaintiff,

v.

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

Counterclaim Defendants.

ECF

Case No. 09-01123 (AKH)

COUNTERCLAIM DEFENDANT ONE 3 TWO, INC.'S OBJECTIONS AND MOTION TO STRIKE EVIDENCE SUBMITTED BY THE ASSOCIATED PRESS

I. INTRODUCTION

As this Court is aware, this case involves claims by The Associated Press ("AP") that One 3 Two, Inc. ("One 3 Two") has infringed the AP's copyright in a photograph of President Barack Obama (the "Garcia Photo") through its use of a stylistic and artistic image of President Obama created by the artist Shepard Fairey. The AP has moved, *inter alia*, for adjudication on One 3 Two's affirmative defense of fair use. In support of its motion, the AP relies on inadmissible evidence regarding two unrelated claims of copyright infringement and related settlements of those claims involving One 3 Two and third parties. *See, e.g.*, Declaration of Brendan T. Kehoe, Esq. in Support of The AP's Motion for Summary Judgment ("Kehoe Decl."), Exhibits 27-32; AP's Rule 56.1 Statement of Undisputed Facts in Support of its Motion for Summary Judgment ("SUF"), Nos. 53-60; AP's Memorandum of Law in Support of its Motion for Summary Judgment at 13-14, 43-44. This evidence is inadmissible because (1) settlements and settlement communications regarding images other than the photograph in dispute are irrelevant (Fed. R. Evid. 402), and (2) such evidence cannot be used to prove One 3 Two's liability (Fed. R. Evid. 408(a)), as the AP apparently seeks to do.[1]

Because this evidence is inadmissible, this Court should strike those Exhibits, and the AP's SUF that rely on the Exhibits, from the summary judgment record. *See* Fed. R. Civ. P. 56(e).

Additionally, a number of other key pieces of evidence cited by the AP are subject to additional evidentiary objections—including hearsay, lack of foundation, and the AP's failure to

[1] Exhibits 27-30, 32 also include inadmissible hearsay. Accordingly, these Exhibits are inadmissible under Federal Rule of Evidence 802 to the extent the AP seeks to rely on those statements for the truth of the matter asserted.

properly authenticate *any* of the deposition exhibits on which it seeks to rely. These objections are stated in One 3 Two's Response to the AP's SUF.

II. LEGAL STANDARD

Evidence offered in support of AP's Motion for Summary Judgment must be admissible. *See* Fed. R. Civ. P. 56(e). "'Materials submitted by a party in connection with a summary judgment motion may be challenged on grounds that would preclude consideration of the material for the purposes of the motion. The vehicle to make this type of contention is a motion to strike.'" *Rohman v. N.Y. City Transit Authority*, 215 F.3d 208, 218 n. 6 (2d Cir. 2000) (quoting James W. Moore, *et al.*, 11 Moore's Federal Practice § 56.14, at 56-197 (3d ed. 1999)).

III. EVIDENCE REGARDING IRRELEVANT THIRD-PARTY CLAIMS AND SETTLEMENTS SHOULD BE EXCLUDED.

A. Evidence Regarding Third-Party Claims Involving One 3 Two (Kehoe Decl. Exhibits 27-32) are Irrelevant

Evidence is relevant if it has "any tendency to make the . . . determination of the action more [or less] probable than it would be without the evidence." Fed. R. Evid. 401. "Evidence which is not relevant is not admissible." Fed. R. Evid. 402.

Exhibits 27-31 of the Kehoe Decl. deal with third parties not involved in this litigation and copyrighted material entirely unrelated to the photograph of President Obama that is the center of this lawsuit. Exhibits 27-28 pertain to One 3 Two's merchandise (*e.g.*, "Cuban Rider" t-shirts) that allegedly infringed copyrighted material owned by the estate of Cuban poster artist Felix René Mederos. Exhibits 29-32 pertain to One 3 Two's merchandise (*e.g.*, t-shirts that include the name of the band The Clash) that allegedly infringed copyrighted material owned by Bravado International Group Merchandising Services, Inc.

Exhibits 27-32, and the AP's discussion of and references to such evidence at SUF Nos. 53-60, are not legally or factually relevant for AP's claim of copyright infringement: they do not address AP's ownership of the Garcia Photo, nor do they address One 3 Two's allegedly unauthorized use of the Garcia Photo. Indeed, the copyrights implicated in Exhibits 27-32 are not even images of President Obama. The AP argues that this evidence demonstrates One 3 Two's "bad faith" in infringing the Garcia Photo and therefore "fair use" is not an available defense for One 3 Two. *See* AP's Motion at 43-44. This analysis is fundamentally flawed on two levels: One 3 Two's usage of unrelated photos has no factual bearing with respect to its usage of the Garcia Photo; and in any event, "bad faith" is not a legally significant factor in fair use analysis. *See, e.g.*, *NXIVM Corp. v. The Ross Inst.*, 364 F.3d 471, 479 n.2 (2d Cir. 2004) ("[W]hile the good or bad faith of a defendant should be considered, it generally contributes little to fair use analysis."); *see also* One 3 Two's Opposition to AP's Motion (filed concurrently), Section VI.B.1. In sum, Exhibits 27-32 do not have "any tendency to make the . . . determination of the action more [or less] probable than it would be without the evidence" and are therefore inadmissible. *See* Fed. R. Evid. 401.

B. Evidence Regarding Settlements With Third Parties (Kehoe Decl., Exhibits 28, 31, 32[2]) Are Also Inadmissible Under Federal Rule of Evidence 408(a)

Rule 408(a) excludes evidence of settlement and its related communications when such evidence is used to prove liability for a claim. *See* Fed. R. Evid. 408(a). This rule applies to settlement discussions and agreements from unrelated litigation. *American Soc'y of Composers v. Showtime/The Movie Channel*, 912 F.2d 563, 580 (2d Cir. 1990); *Hudspeth v. Comm'r of*

[2] One 3 Two seeks to strike a portion of Exhibit 32, at FAIREY300329-300389, on grounds that it is inadmissible under Federal Rule of Evidence 408(a).

I.R.S., 914 F.2d 1207, 1213-14 (9th Cir. 1990); *Abundis v. United States*, 15 Cl. Ct. 619 (1988). The purpose of Rule 408(a) is principally two-fold:

> (1) "[t]he evidence of [of compromise] is irrelevant, since the offer may be motivated by desire for peace rather than from any concession of weakness of position;" (2) "[a] more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes."

Hudspeth, 914 F.2d at 1213-14 (quoting Fed. R. Evid. 408 Advisory Committee's Notes).

The AP uses Exhibits 28, 31, and 32 to argue that One 3 Two is liable for copyright infringement of the Garcia Photo because it acted in "bad faith," making its use of the Garcia Photo not a "fair use." *See* AP's Motion at 43-45. As discussed above, the AP is incorrect in its analysis of the fair use defense, as evidence of settlement is irrelevant to whether One 3 Two's use is entitled to the protections of the fair use defense. Accordingly, such evidence is impermissible under Rule 408(a) and contravenes the public policies underlying the rule, because it subjects One 3 Two to having its "good-faith efforts to settle a [prior] dispute used against [it] in subsequent litigation." *See American Soc'y of Composers*, 912 F.2d at 580.

IV. CONCLUSION

AP must provide competent, admissible evidence in support of its Motion for Summary Judgment. For reasons asserted in this Motion, Exhibits 27-32 are inadmissible under the Federal Rules of Evidence and should be excluded from this Court's consideration of AP's Motion.

Dated: Los Angeles, California
January 27, 2011

Respectfully submitted,

By: /s/

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