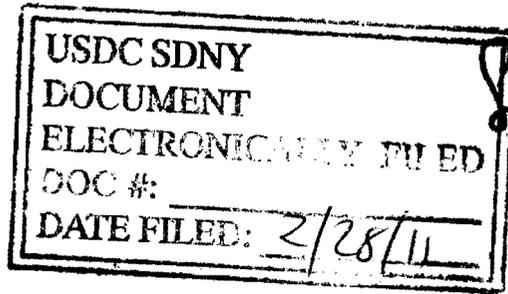


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BY FACSIMILE

February 24, 2011

Hon. Alvin K. Hellerstein
United States Courthouse
500 Pearl Street
New York, New York 10007
Fax: (212) 805-7942



Re: *Fairey, et al. v. The Associated Press, 09 Civ. 1123 (AKH)(S.D.N.Y.)*

Dear Judge Hellerstein:

In accordance with the Court's February 17, 2011 Order, One 3 Two, Inc. d/b/a Obey Clothing ("One 3 Two") and the Associated Press ("the AP") write jointly to request that certain materials be withdrawn from the summary judgment record and that certain materials remain under seal.

First, the parties request that the following exhibits be withdrawn from the summary judgment record, subject to each party's reservation of the right to reinstate these materials if necessary for any purpose: Exhibits A-C to One 3 Two's Motion for Summary Judgment and Exhibits 28 and 30 to the AP's Motion for Summary Judgment.

Next, the parties request that the following exhibits remain under seal: Exhibits R and T to One 3 Two's Motion for Summary Judgment; Exhibits H and I to One 3 Two's Opposition; Exhibits 3, 8, 9, 22, 26, 45, 69, 70, 71, and 74 to the AP's Motion for Summary Judgment; and Exhibits 81, 82, 88, 89, 90, 91, 118, and 119 to the AP's Opposition. In addition, the parties request the redacted version of AP Exhibit 14 submitted concurrently with this joint letter be filed as the public version of that document. As explained below, these exhibits contain the parties' highly confidential financial and proprietary information and could cause substantial harm to the parties' respective businesses if made public.

With respect to One 3 Two, its request is narrowly-tailored to include only those exhibits which contain confidential contract terms and contract negotiations (*see* Exhibits 14 and 74) and One 3 Two's overall financial information (such as its annual financial statements, balance sheets and profit and loss statements which contain information unrelated to the Obama Merchandise at issue in this case). *See* Exhibits R, T, 22, 26, 69, 70, 71, 81, 82, 88, 89, 90, 91, 118, and 119. Regarding Exhibit 14 (the Amended and Restated Trademark License Agreement), One 3 Two requests that the Court permit One 3 Two to make a very limited amount of redactions to Exhibit 14 to prevent the royalty

rates paid to Mr. Fairey and One 3 Two's annual sales forecasts through 2020 from being made public. If this information were made public, it could cause substantial harm to One 3 Two's business. Similarly, Exhibit 74 (a Proposal for Contract Extension dated September 14, 2008) contains confidential contract negotiations (and not finalized contract terms) between One 3 Two and Shepard Fairey and would cause substantial harm to One 3 Two's business if made public. Finally, Exhibits R, T, 22, 26, 69, 70, 71, which contain One 3 Two's overall financial information, including information unrelated to the sale of the Obama Merchandise, could cause substantial harm to One 3 Two's business if made public. However, to the extent that these Exhibits relate to One 3 Two's fair use defense and the AP's rebuttal of that defense, they are necessary to preserve the summary judgment record. AP Exhibits 81, 82, 88, 89, 90, 91, 118, and 119 also contain One 3 Two's highly confidential overall financial information and One 3 Two requests that these Exhibits be withdrawn from the record if its sealing request is denied, as these Exhibits are not essential to the Court's ruling on fair use. The AP opposes One 3 Two's request to withdraw these Exhibits.

As explained in the Declaration of Donald Juncal ("Juncal Decl.") filed in support of One 3 Two's Motion to Seal [Docket No. 171], One 3 Two is a private company and considers its financial information, including but not limited to information relating to revenues, profits, and costs, to be highly sensitive and confidential information. Juncal Decl. at ¶ 3. One 3 Two does not share this information with the general public, its retail accounts, or its competitors. *Id.* If this information were made publicly available, it could cause substantial harm to the Company. *Id.* For example, One 3 Two's competitors could use this information to their advantage and to the disadvantage of One 3 Two. *Id.* In addition, One 3 Two's retail accounts could use this information to try to obtain additional discounts. *Id.* One 3 Two's continued success is dependent upon it maintaining the competitive edge which has contributed to its past success. *Id.* Accordingly, One 3 Two respectfully requests that the aforementioned exhibits containing confidential contract terms and its overall financial information which contains information unrelated to the Obama Merchandise at issue be sealed. *See Bergen Brunswick Corp. v. Ivax Corp.*, No. 97 CIV. 2003, 1998 WL 113976, at *3 (S.D.N.Y. March 12, 1998) (recognizing that "[p]otential damage from the release of sensitive business information" is "a ground for denying access to court documents"); *see also Gelb v. American Tel. & Tel. Co.*, 813 F. Supp. 1022, 1035 (S.D.N.Y. 1993) (granting motion to seal exhibits based on their potential to cause commercial harm pursuant to Rule 26(c)).

The AP respectfully requests that the Court keep six exhibits to the parties' respective summary judgment filings under seal, which fall in to two categories:

- The first category is documents that contain confidential and highly proprietary licensing and revenue information relating to the AP's business. This category includes Exhibit 3 ("AP Images Sales by License Type"), Exhibit 8 ("AP

Images Operations Review”), and Exhibit 9 (“Total Photos Revenues and Expenses”) to AP’s motion for summary judgment (Docket #158), as well as Exhibit T (“Expert Report of Kathleen M. Kedrowski”) to Obey Clothing’s motion for summary judgment (Docket # 163). Making these documents available to the public, and, in particular to AP’s competitors, would cause significant competitive harm to the AP. *See Bergen Brunswick Corp. v. Ivax Corp.*, 1998 WL 113976, at *3; *Gelb*, 813 F. Supp. at 1035. The AP therefore respectfully requests that the documents remain under seal.

- The second category includes materials that contain confidential customer information. This category includes Exhibit 45 to the AP’s motion for summary judgment (Docket # 158), and Exhibits H & I to Obey Clothing’s opposition to AP’s motion for summary judgment (Docket # 182). The disclosure of these documents to the public would reveal the e-mail addresses, other contact information, and buying preferences of thousands of the AP’s customers, undermining the expectation of privacy those customers have in using the AP’s services. We therefore respectfully request that these materials also remain under seal.

With respect to Fairey’s confidential documents, the parties contacted counsel for Fairey who indicated his request that the following exhibits remain under seal: Exhibits 10, 12, 23, 28, 33, 36, 37, 51, 54, 57, 61, 63, 65, 69, and 71 to the AP’s Motion for Summary Judgment; Exhibits 81, 82, 88, 91, 103, 112, 117, 118, 119, 120 and 126 to AP’s Opposition; Exhibits 133, to AP’s Reply; Exhibits D2, D3, E and E1 – E4 to Kathleen Kedrowski’s Expert Report, cited in One 3 Two’s Motion for Summary Judgment; Exhibits O and Q to One 3 Two’s Motion for Summary Judgment, and Exhibits EE, HH, SS and Z to One 3 Two’s Opposition. These exhibits contain Mr. Fairey’s highly confidential financial and proprietary information and could cause substantial harm to Mr. Fairey and his businesses if made public.

Like that of One 3 Two, Mr. Fairey’s request is narrowly-tailored to include only those exhibits which contain sensitive information regarding revenue (*see* Exhibit 65), royalties and commissions related to the Obama Works as well as those paid to the Mederos Estate as part of another project. *See* Exhibits 28 and 63. Publication of royalty rates paid to Mr. Fairey as well as other financial data could cause substantial harm to the business of Mr. Fairey’s companies.

With respect to Mannie Garcia’s confidential documents, the parties have contacted counsel for Mr. Garcia who indicated that Mr. Garcia is willing to withdraw his confidentiality designations for the exhibits submitted under seal in connection with the parties’ summary judgment papers.

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Finally, One 3 Two respectfully requests that the redacted versions of the parties' respective summary judgment papers remain as the public versions of those filings. The AP does not take a position with respect to this request.

Respectfully,

/s/ Laurie C. Martindale
Counsel for One 3 Two, Inc.

/s/Brendan T. Kehoe
Counsel for the Associated Press

cc: All counsel of record.