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UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

SHEPARD FAIREY and OBEY GIANT ART,
 INC.,

Plaintiffs,

-against-

THE ASSOCIATED PRESS and MANNIE
 GARCIA,

Defendants,

-against-

SHEPARD FAIREY, OBEY GIANT ART, INC.,
 OBEY GIANT LLC and STUDIO NUMBER ONE,
 INC.

Counterclaim Defendants.

Case No.: 09-01123 (AKH)
 ECF Case

AMENDED ANSWER,
AFFIRMATIVE DEFENSES AND
COUNTERCLAIMS OF
PLAINTIFFS AND
COUNTERCLAIM
DEFENDANTS

Plaintiffs-Counterclaim Defendants Shepard Fairey (“Fairey”) and Obey Giant Art, Inc. and Counterclaim Defendants Obey Giant LLC and Studio Number One, Inc. by and through their attorneys, hereby answer the Counterclaims of Defendant-Intervenor Mannie Garcia (hereinafter “Garcia”), dated July 23, 2009, as follows:

NATURE OF THE ACTION AND RELIEF SOUGHT

53. Deny the allegations contained in ¶ 53 of Garcia’s Counterclaims, except admit that Fairey used the photo reproduced as Exhibit B to AP’s Answer and Counterclaim (referred to in Garcia’s Counterclaims as the “Garcia Photo,” and hereinafter as the “Obama Photo”) as a reference in creating the illustration that appears on the Obama Works (as identified in the attached Exhibits B-G).

54. Deny information or knowledge sufficient to form a belief as to the allegations contained in ¶ 54 of Garcia’s Counterclaims and on that basis deny the same.

55. Deny information or knowledge sufficient to form a belief as to the allegations contained in ¶ 55 of Garcia’s Counterclaims and on that basis deny the same.

56. Deny information or knowledge sufficient to form a belief as to the allegations contained in ¶ 56 of Garcia’s Counterclaims and on that basis deny the same.

57. Deny information or knowledge sufficient to form a belief as to the allegations contained in ¶ 57 of Garcia’s Counterclaims and on that basis deny the same.

58. Deny the allegations contained in ¶ 58 of Garcia’s Counterclaims, except admit that Fairey used the Obama Photo as a reference in creating the illustration that appears on the Obama Works.

59. Deny the allegations contained in ¶ 59 of Garcia’s Counterclaims, except admit that Fairey used the Obama Photo as a reference in creating the illustration that

appears on the Obama Works, and admit that Fairey sold a limited number of posters based on the Obama Works and a limited number of sweatshirts bearing the “Hope” image.

60. Deny the allegations contained in ¶ 60 of Garcia’s Counterclaims.

61. State that the allegations contained in ¶ 61 of Garcia’s Counterclaims are arguments and conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required deny the same, except admit that The Associated Press (“The AP”) claims it owns the copyright in the photograph referenced in ¶ 61.

62. State that the allegations contained in ¶ 62 of Garcia’s Counterclaims are arguments and conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required deny the same.

63. State that the allegations contained in ¶ 63 of Garcia’s Counterclaims are arguments and conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required deny the same.

63.64. Deny the allegations contained in ¶ 63.64 of Garcia’s Counterclaims, except admit that Fairey used the Obama Photo as a reference in creating the illustration that appears on the Obama Works.

~~64.~~—Deny the allegations contained in ¶ 64 of Garcia’s Counterclaims.

65. Deny the allegations contained in ¶ 65 of Garcia’s Counterclaims, except admit that Obey Giant Art Inc. offered for sale a sweatshirt bearing the “Obama Hope” illustration for \$60 at the Web site <<http://www.obeygiant.com/store>>.

66. Deny the allegations contained in ¶ 66 of Garcia’s Counterclaims.

67. ~~Deny~~Deny information or knowledge sufficient to form a belief as to the allegations contained in ¶ 67 of Garcia’s Counterclaims and on that basis deny the same.

except admit that Fairey used the Obama Photo as a reference in creating the illustration that appears on the Obama Works.

68. Deny the allegations contained in ¶ 68 of Garcia's Counterclaims, except admit that Fairey used the Obama Photo as a reference in creating the illustration that appears on the Obama Works.

69. Deny the allegations contained in ¶ 69 of Garcia's Counterclaims, except admit that Fairey used the Obama Photo as a reference in creating the illustration that appears on the Obama Works.

PARTIES

70. Admit the allegations contained in ¶ 70 of Garcia's Counterclaims.

71. Deny the allegations contained in ¶ 71 of Garcia's Counterclaims, except admit that Shepard Fairey is a visual artist, graphic designer, merchandiser and business owner who resides in Los Angeles, California.

72. Admit the allegations contained in ¶ 72 of Garcia's Counterclaims.

73. Deny the allegations contained in ¶ 73 of Garcia's Counterclaims, except admit that Obey Giant LLC is a California limited liability corporation located at 1331 West Sunset Boulevard, Los Angeles, California 90026.

74. Deny the allegations contained in ¶ 74 of Garcia's Counterclaims, except admit that Studio Number One, Inc. is a California limited liability corporation located at 1331 West Sunset Boulevard, Los Angeles, California 90026.

75. Deny information or knowledge sufficient to form a belief as to the allegations contained in ¶ 75 of Garcia's Counterclaims and on that basis deny the same.

JURISDICTION AND VENUE

76. State that the allegations contained in ¶ 76 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required, admits this Court has subject matter jurisdiction over Garcia's First and Second claims.

77. State that the allegations contained in ¶ 77 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required admit this Court has personal jurisdiction over Plaintiffs and Counterclaim Defendants.

78. State that the allegations contained in ¶ 78 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required admit that this Court has personal jurisdiction over The AP.

79. State that the allegations contained in ¶ 79 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required admit venue is proper in this district.

FACTUAL BACKGROUND

80. Deny information or knowledge sufficient to form a belief as to the allegations contained in ¶ 80 of Garcia's Counterclaims and on that basis deny the same.

81. Deny information or knowledge sufficient to form a belief as to the allegations contained in ¶ 81 of Garcia's Counterclaims and on that basis deny the same.

82. Deny information or knowledge sufficient to form a belief as to the allegations contained in ¶ 82 of Garcia's Counterclaims and on that basis deny the same.

83. Deny the allegations contained in ¶ 83 of Garcia's Counterclaims.

except admit that around January 2008, Fairey used the Obama Photo as a reference in creating the illustration that appears on the Obama Works.

84. State that the allegations contained in ¶ 84 of Garcia's Counterclaims are arguments and conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required deny the same.

85. State that the allegations contained in ¶ 85 of Garcia's Counterclaims are arguments and conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required deny the same.

86. Deny the allegations contained in ¶ 86 of Garcia's Counterclaims, except admit that Fairey did not obtain a license to use the Obama Photo as a reference to create the illustration that appears on the Obama Works.

87. State that the allegations contained in ¶ 87 of Garcia's Counterclaims are arguments and conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required deny the same, except admit that Obey Giant Art, Inc. registered the copyright in the Obama Hope (Reg. No. VA0001651318), Obama Progress (Reg. No. VA 0001651319) and Obama Change (Reg. No. ~~VA0001651320~~) works by Fairey VA0001651320) works by Fairey, admit that Fairey used the Obama Photo as a reference in creating the illustration that appears on the "Hope" and "Progress" works and admit that the copyright applications for the "Hope," "Progress," and "Change" works do not identify the Obama Photo in the "Material Excluded" section of the application.

88. ~~Admit that Fairey and Obey Giant Art Inc. identify in the Complaint the photograph Fairey used as a visual reference to create the Obama Works, which is the photograph attached as Exhibit C to The AP's Answer and Counterrelaims (what The AP and~~

Garcia label the “Clooney Photo”). ~~State that the remaining allegations contained in ¶ 88 of Garcia’s Counterclaims are arguments and conclusions of law as to which no responsive pleading is necessary, but to the extent any response is required deny the same.~~ Deny the allegations contained in ¶ 88, except admit that Fairey used the Obama Photo as a reference in creating the illustration that appears on the Obama Works, and admit Fairey identified the wrong photograph in the original Complaint by mistake.

89. Deny information or knowledge sufficient to form a belief as to the allegations contained in ¶ 89 of Garcia’s Counterclaims and on that basis deny the same.

90. Deny information or knowledge sufficient to form a belief as to the allegations contained in ¶ 90 of Garcia’s Counterclaims and on that basis deny the same.

FIRST COUNTERCLAIM – COPYRIGHT INFRINGEMENT

91. Repeat and reallege each and every response to ¶¶ 53 to 90 above as if fully set forth herein.

92. State that the allegations contained in ¶ 92 of Garcia’s Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent a response is required deny the same.

93. State that the allegations contained in ¶ 93 of Garcia’s Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent a response is required deny the same.

SECOND COUNTERCLAIM — CONTRIBUTORY COPYRIGHT INFRINGEMENT

94. Repeat and reallege each and every response to ¶¶ 53 to 93 above as if fully set forth herein.

95. State that the allegations contained in ¶ 95 of Garcia’s Counterclaims

are conclusions of law as to which no responsive pleading is necessary, but to the extent a response is required deny the same.

96. Deny the allegations contained in ¶ 96 of Garcia's Counterclaims.

97. State that the allegations contained in ¶ 97 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent a response is required deny the same.

98. State that the allegations contained in ¶ 98 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent a response is required deny the same.

99. State that the allegations contained in ¶ 99 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent a response is required deny the same.

THIRD COUNTERCLAIM — DECLARATORY JUDGMENT

100. Repeat and reallege each and every response to ¶¶ 53 to 99 above as if fully set forth herein.

101. Deny information or knowledge sufficient to form a belief as to the allegations regarding The AP's copyright registrations contained in ¶ 101 of Garcia's Counterclaims and on that basis deny the same. Deny the remaining allegations of ¶ 101.

102. Deny the allegations contained in ¶ 102 of Garcia's Counterclaims, except admit that Obey Giant Art, Inc. registered the copyright in the Obama Hope (Reg. No. VA0001651318), Obama Progress (Reg. No. VA 0001651319), and Obama Change (Reg. No. VA0001651320) works.

103. Deny information or knowledge sufficient to form a belief as to the

allegations contained in ¶ 103 of Garcia's Counterclaims and on that basis deny the same.

104. State that the allegations contained in ¶ 104 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent a response is required deny the same.

105. State that the allegations contained in ¶ 105 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent a response is required denies that there is a justiciable controversy between Plaintiffs and Counterclaim Defendants on the one hand, and The AP or Garcia on the other, regarding The AP's and/or Garcia's right to use the Obama Photo they assert a copyright in.

106. State that the allegations contained in ¶ 106 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent a response is required deny a declaration is necessary and appropriate against Plaintiffs and Counterclaim Defendants to affirm The AP or Garcia's right to continue to make use of the Obama Photo.

107. State that the allegations contained in ¶ 107 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent a response is required deny the same.

108. State that the allegations contained in ¶ 108 of Garcia's Counterclaims are conclusions of law as to which no responsive pleading is necessary, but to the extent a response is required deny the same.

PRAYER FOR RELIEF

109. Repeat and reallege each and every response to ¶¶ 53 to 108 above as if fully set forth herein. Deny Garcia is entitled to any relief whatsoever.

COUNTERCLAIM-DEFENDANTS' AFFIRMATIVE DEFENSES

FIRST DEFENSE

1. Intervenor-Defendant's counterclaims are barred because the alleged infringement is a non-infringing fair use as set forth in 17 U.S.C. § 107 and the common law.

SECOND DEFENSE

2. Intervenor-Defendant's counterclaims are barred in whole or in part by the First Amendment of the United States Constitution.

THIRD DEFENSE

3. Intervenor-Defendant's alleged copyright registration is invalid or unenforceable due to the failure to comply with the requirements of Title 17 of the United States Code.

FOURTH DEFENSE

4. Intervenor-Defendant's counterclaims are barred in whole or in part by the equitable doctrine of judicial estoppel.

FIFTH DEFENSE

5. Any damages and profits sought by Intervenor-Defendant are limited, in whole or in part, pursuant to 17 U.S.C. §504(b) and exclude deductible expenses and any elements of profit attributable to factors other than the alleged infringement of Intervenor-Defendant's copyrighted work.

SIXTH DEFENSE

6. Plaintiffs and Counterclaim Defendants have made no profit as a result of the complained of acts, including any profit under 17 U.S.C. §504(b) that is attributable to

Intervenor-Defendant's allegedly infringed copyright.

SEVENTH DEFENSE

7. Any statutory damages sought by Defendant pursuant to 17 U.S.C. §504(c) are limited, in whole or in part, because any alleged infringement was not committed willfully and Fairey was not aware and had no reason to believe that his acts constituted an infringement of copyright.

EIGHTH DEFENSE

8. Intervenor-Defendant has failed to mitigate its purported damages and recovery of damages, if any, must be reduced accordingly.

SHEPARD FAIREY, OBEY GIANT ART, INC.,
OBEY GIANT LLC AND STUDIO NUMBER ONE, INC.'S COUNTERCLAIMS
AGAINST MANNIE GARCIA

Plaintiffs Shepard Fairey (“Fairey”), Obey Giant Art, Inc. (“Obey Giant”) and Counterclaim Defendants Obey Giant LLC and Studio Number One, Inc., by and through their attorneys, bring the following counterclaims against Intervenor-Defendant Mannie Garcia (“Garcia”):

NATURE OF THE ACTION AND RELIEF SOUGHT

1. This is a civil action for declaratory and injunctive relief to vindicate the rights of visual artist Shepard Fairey, Obey Giant, Obey Giant LLC and Studio Number One, Inc. in connection with the series of iconic works Fairey created to support the candidacy of President Barack Obama. Fairey’s work became a ubiquitous symbol of Obama’s historic presidential campaign and stood as powerful symbols of Obama’s grassroots support.

2. The AP has asserted that Fairey’s work – one piece of which now hangs in the Smithsonian Institution’s National Portrait Gallery in Washington D.C. – infringes the copyrights in a photograph that was apparently taken by Intervenor-Defendant Garcia, which depicts Obama at a panel discussion at the National Press Club in April 2006. Garcia has asserted that Fairey’s work infringes his copyrights in the same photograph. Fairey, Obey Giant, Obey Giant LLC and Studio Number One, Inc. bring this action to clarify the rights of the parties, and to refute the baseless assertions of copyright infringement by the AP and Garcia finally and definitively. Fairey, Obey Giant, Obey Giant LLC and Studio Number One, Inc. seek a declaratory judgment holding Fairey’s works do not infringe any copyrights held by Defendant AP or Intervenor-Defendant Garcia and are protected by the Fair Use Doctrine. Fairey, Obey