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THE ASSOCIATED PRESS

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, and STUDIO
NUMBER ONE, INC.,

Counterclaim Defendants,

And

MANNIE GARCIA,

Defendant, Counterclaim
Plaintiff and Cross Claim
Plaintiff/Defendant,

v.

Case No.: 09 CIV 01123 (AKH)

**DECLARATION OF DALE M.
CENDALI IN SUPPORT OF THE
AP'S OPPOSITION TO THE
MOTION FOR SUBSTITUTION
OF COUNSEL**

SHEPARD FAIREY AND OBEY GIANT
ART, INC.,

Counterclaim Defendants,

And

THE ASSOCIATED PRESS,

Cross Claim
Plaintiff/Defendant.

I, DALE M. CENDALI, hereby declare as follows:

1. I am a partner in the firm of Kirkland & Ellis LLP, counsel to The Associated Press (“The AP”) in this action. I submit this declaration in support of The AP’s Opposition to the Motion for Substitution of Counsel filed by Shepard Fairey, Obey Giant Art, Inc., Obey Giant LLC, and Studio Number One, Inc. (together, “Fairey”). I make this declaration based upon my knowledge of matters in this action and to place before the Court the following documents.

2. Before this case was filed, an issue arose as to what image Fairey appropriated to make the graphic posters of Barack Obama at issue in this lawsuit (the “Obama Posters”).

3. By February 9, 2009, when Fairey filed this action, numerous third parties had concluded that Fairey used a tightly-cropped photograph of Barack Obama looking presidential in front of the red, white, and blue American flag (the “Obama Photo”), to make Fairey’s red, white, and blue Obama Posters.

4. Though Fairey’s complaint attached an article picturing the Obama Photo as the source of the Obama Posters, the complaint stated that Fairey used a different AP photograph,

which depicted George Clooney sitting next to Barack Obama from the same press event, to make the works.

5. Months of intense discovery ensued in which The AP pressed for documents about the source photo that Fairey had used. In addition, The AP has taken four depositions on these topics, including Amanda Fairey, Olivia Perches, Glen E. Friedman, and Sean Bonner, all of whom were identified in Fairey's Initial Disclosures as individuals with knowledge about the "creation of the Obama Works."

6. The AP repeatedly requested that Fairey be more transparent about its preservation, collection, search, and production of documents. In response, Fairey's counsel stated in broad generalizations that Fairey had searched for and produced all documents concerning the creation of the Obama Posters.

7. While exchanging drafts of a joint letter to the Court on these and other discovery issues, The AP repeatedly identified metadata, including specific file names, to Fairey concerning documents that had not been produced but that The AP believed existed, which related to the creation of the Obama Posters. The AP sent Fairey an e-mail on October 1st identifying the specific file paths for these documents on Fairey's computers and asked Fairey's counsel whether those file paths had yet been searched.

8. The AP's October 1st e-mail led to Fairey's counsel's claimed discovery on October 2nd that Fairey had fabricated evidence and destroyed or attempted to destroy highly-relevant documents in an effort to cover up the true identity of the source image, which Fairey's counsel admitted in its October 9th letter to The AP and Mannie Garcia ("Garcia"). Attached hereto as **Exhibit A** is a true and correct copy of Anthony Falzone's and Joseph Gratz's letter to

Dale Cendali, George Carpinello, and Bradford Kile on October 9, 2009, regarding “*Fairey, et al. v. The Associated Press, Case No.: 09-cv-1123 (AKH)*.”

9. Fairey’s October 9th letter stated that opposing counsel “may have questions about the issues raised in this letter,” and offered to discuss how “Plaintiffs might be able to address them in a way that minimizes expense and delay.” Fairey’s counsel, however, has not done so, refusing to answer such basic questions as: a) When did Fairey fabricate and destroy documents?; b) Where and on whose computers were the documents found?; c) What documents have been destroyed or are not recoverable (e.g., Fairey has still not produced a copy of the Obama Photo that he downloaded from the Internet)?; and d) Why did Fairey’s counsel fail to find the documents earlier given their repeated representations that they had searched for and produced all documents related to the creation of the Obama Posters.

10. Fairey’s counsel has declined to participate in day-to-day discovery since October 9th, refusing to: a) produce documents that Fairey had promised The AP months ago and in response to The AP’s most recent document requests, b) go forward with scheduled depositions, including that of Mannie Garcia’s, or c) schedule Shepard Fairey’s deposition, though it was originally scheduled for September 29th and 30th and discovery has now closed.

11. To that end, The AP and Garcia received an e-mail from Anthony Falzone of the Stanford Fair Use Project on October 15th informing the parties that Durie Tangri LLP and the Stanford Fair Use Project intended to seek the Court’s permission to withdraw from the case as soon as practicable. Mr. Falzone stated in his e-mail that “[w]e also expect new counsel will require a significant extension of the discovery cutoff to get up to speed and it will be infeasible to conduct any depositions in the next several weeks.” The e-mail also stated, “As for providing more information about the search for responsive documents, this is an issue on which new

counsel will need to be consulted and involved. In addition, Joe Gratz is out of the country and on vacation until Sunday. Given his role in the discovery process, we wouldn't be in a position to provide any information until next week at the earliest, even assuming new counsel is in place by then." Attached hereto as **Exhibit B** is a true and correct copy of Anthony Falzone's e-mail to Dale Cendali on October 15, 2009, with the Subject "Fairey v. AP - amended pleadings and discovery scheduling."

12. Most recently, Fairey's counsel provided the other parties on October 28, 2009 with a letter that for the first time generally discussed Fairey's search for documents and the spoliation issues, but designated the letter as privileged under the Protective Order entered in this case, Rule 408, and the attorney-client privilege.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 9th day of November 2009 at New York, New York.

s/ Dale M. Cendali

Dale M. Cendali