

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

ERIC MCNATT,

Plaintiff,

vs.

RICHARD PRINCE, BLUM & POE, LLC, and
BLUM & POE NEW YORK, LLC,

Defendants.

Case No. 1:16-CV-08896-SHS

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

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Defendants Richard Prince, Blum & Poe, LLC, and Blum & Poe New York, LLC hereby submit this memorandum of law in support of their motion for summary judgment (“Motion”).

PRELIMINARY STATEMENT

Richard Prince’s *New Portraits* promote the very goal copyright was created to further – the constitutionally mandated “progress” of the arts. U.S. Const. art. I, § 8, cl. 8. Indeed, the social commentary Prince makes through the *New Portraits* is a core fair use principle (17 U.S.C. § 107), expressed through a novel technological and sociological medium and context. Eric McNatt’s demand for the “seizure and forfeiture” of art (ECF 1 at 26), if granted, would have a chilling effect on the progress in the arts, to the detriment of the public.

In his *New Portraits*, Prince continued the well-established artistic method of finding inspiration in that which already exists and recontextualizing it in a manner that alters its very meaning and purpose. In this case, that which already existed pervasively on the internet was an image of the musician Kim Gordon. There is no dispute that McNatt took a photograph of Kim Gordon (the “Photograph”) and permitted that image to be posted to the web and social media (including on the account of Kim Gordon herself), without any restriction on its further dissemination. And there is no dispute that Prince, after finding the image of the Photograph on one of the many forums on which it was disseminated, used the image in one of his *New Portraits*. The only dispute is whether Prince’s use was fair. Based on the evidence now before the Court—including a full-size replica of Prince’s painting, rather than the intentionally distorted photocopied reproductions included with McNatt’s complaint—that question must be answered affirmatively.

Not only does Prince’s work have a transformative message, meaning and purpose, but it also has in no way usurped McNatt’s market – indeed, McNatt has never even tried to sell a physical print of the Photograph. The *New Portraits* continue Prince’s over 40-year career of using found photos and objects in order to comment on them and society, through the use of text and recontextualization. This

is not a case of forgery, piracy, counterfeit or plagiarism; nor is it copyright infringement. Indeed, the purchaser of the Prince painting has unequivocally stated that he would never have purchased the Photograph; rather, he wanted the content, context, commentary, and technique of the Prince work. Indeed, it would make no sense for someone to pay for a Richard Prince if they wanted the Photograph, which they could easily purchase for a fraction of the price of a New Portrait.

Specifically, Prince's use of the image of the Photograph was a fair use for a number of reasons. First, Prince's work is highly transformative, having a different purpose and meaning than the Photograph, as underscored by his intent and the perceptions of a reasonable observer, reflected in the consumers and exhibitors of Prince's work and experts in the field. In using an image that Prince found, but repositioning it in a larger-than-life form in the physical media of canvas made to appear like a giant iPhone, adding his comments, reproducing it in a painting using elements of the Instagram frame, and displaying it with other Instagram-themed portraits, Prince has imbued what was once an austere depiction, documenting a female rocker in a defiant pose, into part of an ode to social media. There are innumerable ways an artist can transform an existing object – that Prince did not cut, mark, paint over, scratch or otherwise obscure the image of the Photograph (as he did in the *Cariou* case) is critical, *not detrimental*, to his fair use of the Photograph. Had he done anything to alter the post as it appeared before he captured it, his intent in authentically replicating in the physical world the virtual world of social media would go unseen. Of course, Prince did alter the Photograph in adjustments in size, scale, canvas, color, cropping, focus, etc. But the most dramatic aesthetic alteration he made was not through marking or altering the portion of the image he used, but instead through inserting it into a radically different aesthetic context. By blowing up an image that people typically only see on a small screen into a giant painting and selecting a specific media and coloration, Prince transformed the image from a documentary photographic portrait to commentary on the nature of social media. In analyzing the

entirety of the two works at issue (which is required, as opposed to analyzing only the photographic elements of the works) the transformation is indisputable.

The evidence further militates a finding of fair use based on the key fourth factor of the fair use test – whether Prince’s work had an adverse effect on the market for the Photograph. As he is well aware, McNatt does not have the necessary model release to further exploit the image of Kim Gordon, as he has done in the past without her authorization. It is also undisputed that the *Portrait of Kim Gordon* is a single-edition work that was only briefly on the market and is not expected to return to the market. McNatt’s works and Prince’s works exist in entirely distinct markets; McNatt has *never created or sold any physical prints* of the Photograph and the owner of the *Portrait of Kim Gordon* has unequivocally stated that he would never have purchased or displayed the Photograph. Finally, McNatt has not lost any opportunities to sell or license the Photograph, and became better-known after the alleged infringement. The market responded to the *New Portraits* because of Prince’s history of commenting on social issues and because of his concept and technique: taking his manufactured social media posts, often appearing only on his phone, turning them into thought-provoking critiques of the increasing use of social media as a primary form of modern day communication. Like so much of Prince’s work for decades, it is indisputable that no one else had done it before. These market factors, including that the market consumed the Prince work at nearly 1000 times more than the amount of the McNatt work, underscores that a reasonable observer views the *Portrait of Kim Gordon* as transformative.

This Motion does not purport to address the outer limits of what an artist can do with a photograph in general; it addresses whether a single photograph used in a single painting where the use is transformative and had no impact for the genuine product, in fair use. Without question, there will be some copying that goes too far and is not fair. That will always be true. Prince’s work in this

case, however, falls within the boundaries of fair use.

STATEMENT OF FACTS

A. Background

1. Social Media has Caused a Paradigm Shift in How People Communicate and Share Content

Social media has revolutionized the ways in which people communicate with each other, express themselves, and engage in creative work. (UF ¶ 87).¹ Image-sharing is a key feature of social media (*id.* ¶ 88) and one of the most significant uses of the contemporary internet. On Instagram, 95 million images and videos are uploaded *daily*. (Boyajian Decl. Ex. 3 ¶ 63).

Privacy settings and other techniques can be used to control distribution of an image – either to restrict access or to deter copyright, on the one hand, or encourage viral distribution, on the other hand. Social media users who do not want a photograph to be circulated freely can choose not to post it, to post it “privately” (i.e., only visible to the person who uploaded it and a select set group of family or “friends”), or to post it with a copyright notice or watermark. (UF ¶ 91). People can also choose to have private accounts altogether, restricting who can see any content about them. (*Id.*). Conversely, many social media users, and specifically those who post works for commercial or promotional purposes, like McNatt, post content, and allow content to be posted, with the expectation, or even the goal, that it will be *virally* reposted, re-distributed, and commented on, by persons known and unknown to the original poster. (*Id.* ¶ 92; Boyajian Decl. Ex. 3 ¶ 15; Boyajian Decl. Ex. 4 at 239; Boyajian Decl. Ex. 5 at 7-8, 52-53). As a result, social media platforms, and Instagram in particular, have become a popular and important tool for self-promotion, self-branding, and self-expression—perhaps best exemplified by “selfies,” which are taken for the *express* purpose of sharing and posting. (Boyajian

¹ Citations to “UF” refer to defendants Richard Prince, Blum & Poe, LLC and Blum & Poe New York, LLC’s Rule 56.1 Statement of Undisputed Material Facts In Support of Their Motion for Summary Judgment. Citations to “Ex. ” refer to exhibits attached to the Declaration of Nina D. Boyajian in Support of Defendants Richard Prince, Blum & Poe, LLC and Blum & Poe New York, LLC’s Motion for Summary Judgment.

Decl. Ex. 3 ¶¶ 77-80).

2. Appropriation as a Well-Established and Valued Artistic Technique

Starting in the early twentieth century, modern visual artists began borrowing and altering pre-existing objects and images to create new, original works of art. Marcel Duchamp, Picasso, and Warhol are just some examples of “appropriation artists.” (Boyajian Decl. Ex. 6 ¶¶ 16-18). Indeed, great masters, including Picasso, borrowed from other artists, and Picasso’s heirs and estate are advocates not only of the practice of appropriation in general, but also specifically in Prince borrowing from Picasso himself, as he has previously done. (Boyajian Decl. Ex. 7 ¶ 13; Boyajian Decl. Ex. 70 at 75:3-6).

B. Richard Prince and His Artwork

Richard Prince is one of the most important, internationally recognized contemporary artists. (UF ¶ 1). Spanning four decades and numerous media, Prince’s work has redefined how art is made and viewed in the post-modern era. (Boyajian Decl. Ex. 8 ¶ 33; Boyajian Decl. Ex. 6 ¶ 20). The enormous significance of Prince’s work in general, and the *New Portraits* specifically, has been recognized by leading institutions of art throughout the world. (UF ¶ 2; Boyajian Decl. Ex. 8 ¶ 28; Boyajian Decl. Ex. 6 (noting that the Los Angeles County Museum of Art recently acquired one of Prince’s *New Portrait* works); Prince Decl. ¶ 37). For decades, like other practitioners of “appropriation art,” Richard Prince has found inspiration and culled his subject matter from existing imagery and objects from American media and pop culture. (Boyajian Decl. Ex. 8 ¶ 33). He then re-photographed those images, underscoring the endless repetitions and patterns. (Prince Decl. ¶ 3). Prince described this pioneering process as creating collage, but with an “electronic scissor,” which is how he imagined his camera. (*Id.* ¶ 11). Common themes have pervaded Prince’s art throughout his career, most notably, the use of words and text, a search for commonality, and a response to technological changes. (UF ¶¶ 26, 29; Prince Decl. ¶¶ 7-9).

1. Prince's *New Portraits*

The *New Portraits* are an update on the type of re-photography work that Prince first made prominent in the 1970s. When Prince was exploring Instagram in the spring of 2014 (Boyajian Decl. Ex. 10 at PRINCE_MCNATT0000249; UF ¶ 3), he was fascinated by the new form of communication in this virtual world—both through the images being shared and the unique nature of the language people used—and quickly recognized that he could use a combination of Instagram and “screenshotting” to create an entirely original type of portrait: his *New Portraits*. (UF ¶¶ 3-11; Prince Decl. ¶ 11; Boyajian Decl. Ex. 10 at PRINCE_MCNATT0000254).

Prince spent weeks and months – and hours on a single profile – on Instagram to select the images that he used as a starting point for his *New Portraits* series, and envisioned that “the iPhone became [his] studio.” (UF ¶ 4). He decided early on that he wanted to include certain comments in his screenshot of the Instagram posts, as well as the person’s “profile” icon that appears on the upper left side of the screenshot. But Prince then asked himself how else he could contribute to this new type of portrait he was creating.

I didn't want to paint it
I didn't want to mark it.
I didn't want to add a sticker.
Whatever I did, I wanted it to happen INSIDE and before the save. I wanted my contribution to be part of the ‘gram.’ I didn't want to do anything physical to the photograph after it was printed.

(Boyajian Decl. Ex. 10 at PRINCE_MCNATT0000254). Prince combed through all of the comments on the thousands of posts he viewed to determine which comments had interesting language that he wanted to comment on and include in his portrait, and which ones he wanted to exclude. (UF ¶ 5). Commenting was Prince’s “contribution.” (*Id.* ¶ 7). Though Prince does not always make a direct parody of just the image, he does make a parody of the entire *post*, which consists of both the images

and the added user commentary. (Prince Decl. ¶ 31).² Prince also uses the comments to make “inside jokes” with his friends, as many on social media do. (UF ¶ 25; Prince Decl. ¶ 30).

Like many on social media do, in the process of creating the *New Portraits* and adding his own comments, Prince often “adopted” the “personality” and language nuances of either the individuals featured in the specific post or the commenters to that post. (Prince Decl. ¶ 19). Where the image he used for a *New Portrait* was of a rock star, he quoted a lyric from the band; where the image was of a woman who made a flirtatious comment, Prince flirted back. (*Id.*). The comments were as varied as the images of people, who were as varied as the users of social media. (*Id.*).

Prince determined that he could only keep three user comments in a screenshot, and figured out a creative way to delete comments so that he could choose which comments (including his) would appear on the screensave in which order, and which comments to remove. (UF ¶ 9). Often, the resulting image was a unique combination of photographs and text that existed only at a single moment in time, and only on his iPhone (other users’ views of the original post were not affected). (*Id.* ¶ 10).

Next, he captured the Instagram post in a screenshot and sent the digital file to his studio assistant who cropped the file according to his instructions, such that only certain of the Instagram content was included in the portrait, framed by white space. (*Id.* ¶ 11). Then the portrait was printed on paper in Prince’s studio in color “studies” from which Prince would select a much smaller set to be enlarged, printed, and stretched on canvas. (*Id.* ¶ 12).

Prince “spent a great deal of time considering the presentation” of his *New Portraits*. (*Id.* ¶ 13). After experimenting with different types of media on which to print the Instagram works, including on wood, plastic, and metal—like the material of the iPhone—Prince worked with a printing lab and

² Prince made the following statement while discussing the *Portrait of Kim Gordon* specifically, but in context, it is clear that Prince was referring to the purpose of all his comments in the *New Portraits*: “[I]t seemed at the time, even though I was late to Instagram, everybody I knew was on Instagram. And I think a lot of the comments or some of the comments were simply I was commenting on the idea of social media.” (Boyajian Decl. Ex. 9 at 202:16-21).

selected a brand-new type of canvas that was unique in the way the ink would sit on top of the canvas, rather than being absorbed by it. (*Id.* ¶ 14).³ As a result, the *New Portraits* have a dreamlike quality, are deliberately out of focus, and have a color tint. (Prince Decl. ¶ 23; Boyajian Decl. Ex. 10 at PRINCE_MCNATT0000258).

Prince chose to have all of the paintings be a uniform size. The *New Portraits* measure 65.75” x 48.75”, and the photographic element of the *New Portraits* measure approximately 41 x 41 inches, as an homage to Andy Warhol’s portraits in approximately that size. (UF ¶ 15). By contrast, a person would generally see the same view on a screen ranging from 4 inches to 6 inches (depending on the mobile device), with the photographic element as seen in the Instagram application being even smaller than that. (Prince Decl. ¶ 25). In other words, the photographic element of the *New Portraits* are at least 20-30 times larger than they would appear on a user’s personal device.

Finally, Prince elected to have the portraits remain frameless, and the canvases stretched in a way that the paintings wrap-around the wooden stretchers so that they were three-dimensional paintings resembling a white iPhone, rather than a two-dimensional photograph. (UF ¶ 16). The stretcher bars were so significant to the *New Portraits* works that they were separately photographed in a gallery book made in connection with the *New Portraits* exhibition at Blum & Poe. (*Id.* ¶ 17).

While some may attempt to minimize the creativity, time, and effort that went into creating the *New Portraits* (both literally and conceptually), photography was also once challenged with similar criticisms—after all, how difficult is it to press a button? (Boyajian Decl. Ex. 13 ¶ 3; Boyajian Decl. Ex. 14 at 212:10-213:13). In the case of the *New Portraits*, each element was carefully considered: media, scale, stretcher bars, size of the image portion, and the selection of which of the sometimes

³ The inkjet process Prince used is a far cry from the inkjet printers that most people would have in their homes or offices, and certainly different than what was possible even 20 years ago. (Prince Decl. ¶ 23). Prince’s choice to use this type of inkjet printing for the *New Portraits* is as significant – and impactful – as another artist’s choice to sculpt using clay, bronze, or another material. (*Id.*).

hundreds of comments to “keep,” and what to say in response. (UF ¶¶ 5, 13-16). In hindsight, these decisions may seem obvious; but it was Richard Prince who had the foresight to make them. As an artist, Prince strives to “try[] to do something that no one else in the art world has done before.” (Boyajian Decl. Ex. 9 at 130:19-22). McNatt’s own proffered expert⁴ agrees that Prince did indeed do something “new” with his *New Portraits*. (Boyajian Decl. Ex. 14 at 224:9-225:16).

2. Creation of the *Portrait of Kim Gordon*

Prince’s *Portrait of Kim Gordon* was one of the *New Portraits* series and was created using a technique similar to that described above. Specifically, Prince wanted to create a New Portrait of Kim Gordon, a musician and artist he has been friends with for decades. (UF ¶ 24). Prince searched online and through Instagram, including Kim Gordon’s own Instagram feed, for an image of Ms. Gordon until he found an image that he wished to turn into a New Portrait. (*Id.* ¶ 19). Prince took a mobile screenshot of that image as found online, and posted that screenshot to his own Instagram account, @richardprince4, with the addition of the following commentary: (1) “Portrait of Kim Gordon” (2) “Kool Thang You Make My Heart Sang You Make Everythang Groovy” and (3) music-themed emojis. Notably, the second comment was a play on Ms. Gordon’s band’s first major label record single, “Kool Thing.” (*Id.* ¶ 21).

C. Blum & Poe Gallery

Blum & Poe is a contemporary art gallery with locations in New York, Los Angeles, and Tokyo. Blum & Poe works closely with artists to display works of significant ambition. (Jeff Poe Decl. ¶ 2). Blum & Poe exhibited twenty-six of Prince’s *New Portraits* works in its Tokyo, Japan gallery from April 3, 2015 through May 30, 2015 (the “Exhibition”). (UF ¶ 31). Prince’s *Portrait of Kim*

⁴ Concurrently with this Motion, defendants have moved to exclude, either in whole or in part, the proffered expert testimony of Amy Whitaker, Barbara Sussman, Nate Harrison, Michelle Bogre, June Besek, Allan Douglass Coleman, and Stephen Holzen. Defendants’ citation to any opinions offered by those experts is without prejudice to their arguments in excluding them (indeed, the citations underscore many of the bases for their exclusion).

Gordon was one of those paintings. (*Id.* ¶ 33). Each of the works in the Exhibition, including the *Portrait of Kim Gordon*, were priced at [REDACTED]. (*Id.* ¶ 34). *Portrait of Kim Gordon* was purchased before the Exhibition opened on the recommendation of Alexander DiPersia for and his and his mother's joint collection. (*Id.* ¶ 36; Supp. DiPersia Decl. ¶¶ 5, 8).

More than a year after the Exhibition ended, in September 2016, Blum & Poe released a book commemorating the Exhibition (the "Gallery Book"). (UF ¶ 37). The Gallery Book contained images of each of the *New Portraits* works on display at the Exhibition (including the stretcher bars from the back of each New Portrait), installation images depicting portions of the Exhibition, and an excerpt from Prince's "Birdtalk" which described his process for making the *New Portraits* works. (*Id.* ¶ 38). Because all of the *New Portraits* works included in the Exhibition had already been sold at the time the Gallery Book was published, it is not possible that anyone purchased any works from the Blum & Poe show after seeing the Gallery Book. (*Id.* ¶¶ 41-42).

D. Eric McNatt

Eric McNatt is a photographer based in New York. (UF ¶ 43). Throughout his career, McNatt has primarily been commissioned to take commercial photographs for editorial and advertising purposes. (*Id.* ¶ 44). The vast majority of his photography is thus displayed in magazines and advertising campaigns, not galleries or museums. (Compl. ¶ 12; Boyajian Decl. Ex. 5 at 111:11-113:8). Indeed, during the course of career, his images have been displayed in a gallery on only two occasions, both in 2009, as a part of group shows. (UF ¶ 48). McNatt has frequently licensed his images for a fee of \$100. (UF ¶ 45).

1. McNatt's Photograph of Kim Gordon

a. Paper Magazine Provided Specific Creative Directives to McNatt

McNatt took the Photograph on July 25, 2014 in connection with an interview for publication

in *Paper Magazine*.⁵ (*Id.* ¶ 50). Kim Gordon was one of 37 artists and icons (referred to as the “Original Gangsters” or “OGs”) selected by *Paper* for their 30th anniversary issue. (*Id.* ¶ 52). As *Paper* strived to “[REDACTED],” all creative direction for the Photograph was provided by the magazine. (See UF ¶ 53). Specifically, McNatt was provided with a written guide for the commissioned images that directed him to comply with the following creative directives:

[REDACTED]

[REDACTED]. Included with the creative directives were a series of six sample photographs which demonstrated *Paper*’s art direction for the photoshoot. (*Id.* ¶ 54). Notably, these photographs have the identical mood and appearance as McNatt’s photograph of Kim Gordon. (See Boyajian Decl. Ex. 23). *Paper Magazine* paid McNatt between \$50 and \$100 for the photoshoot and use of the McNatt Photograph. (UF ¶ 51)

b. McNatt did not Obtain the Necessary Model Release from Kim Gordon to Continue to Exploit her Image, which he has Knowingly Done

McNatt did not obtain a written right of publicity waiver from Kim Gordon to use her name, image, and likeness commercially. (*Id.* ¶ 78). In emails regarding the Photograph in February 2015, McNatt acknowledged that he needed Ms. Gordon’s consent to use any of the images from the photoshoot other than for their original use in *Paper Magazine*. [REDACTED]

[REDACTED]

[REDACTED] In another, dated February 10, 2015, McNatt requested that Samantha

⁵ For purposes of this motion only, defendants do not contest McNatt’s ownership of a copyright in the Photograph. Whether or not he owns the copyright, it is undisputed, however, that he does not have a model release or other license from Kim Gordon to commercially exploit the Photograph. (UF ¶¶ 78-83).

Xu of Billboard not send the link of photographs to Ms. Gordon’s representatives. (*Id.* ¶ 81; Boyajian Decl. Ex. 25 (“I would please ask not to send this link to any of Kim’s people. Please.”)). *Despite not receiving permission from Ms. Gordon*, McNatt nevertheless exploited Ms. Gordon’s image by licensing the Photograph to VOGUE.com for [REDACTED]. (UF ¶ 82). Ms. Gordon confirms that she did not give McNatt permission to use her image for any purpose other than the *Paper* Magazine article and “do[es] not approve of any further potential uses by him of the Photograph.” (*Id.* ¶ 83; Gordon Decl. ¶¶ 8, 14).

c. The Photograph was Widely Disseminated on Social Media

An image of the Photograph was posted on *Paper*’s Instagram page on September 9, 2014 (UF ¶ 58) and on *Paper*’s website on September 9, 2014, alongside the magazine’s interview with Ms. Gordon. (*Id.* ¶ 59). Additionally, a link to the *Paper* Magazine article was posted on McNatt’s Twitter page on September 10, 2014, and Ms. Gordon replied to McNatt’s Twitter post on the same date. (*Id.* ¶ 60). Ms. Gordon also posted an image from *Paper* Magazine’s article—which included an image of the Photograph—to her own Instagram page on September 10, 2014. (*Id.* ¶ 61). On September 13, 2014, McNatt posted an image of the Photograph from *Paper* Magazine’s article to his Instagram page. (*Id.* ¶ 62). The image of the Photograph has further circulated widely on social media without attribution since the date it was first posted.⁶

At the time *Paper* and Kim Gordon posted an image of the Photograph to Instagram, Instagram’s Terms of Use provided that its users grant to Instagram “a non-exclusive, fully paid and royalty-free, transferable, sublicensable, worldwide license to use the Content that you post on or through the Service[.]” (*Id.* ¶ 65). As a user of Instagram at the time the Photograph was posted, McNatt

⁶ The Photograph was posted to *Paper* Magazine’s Tumblr blog without attribution on September 10, 2014. (UF ¶ 67). The image posted on *Paper*’s Tumblr was subsequently reblogged 90 times, including by Tumblr sites called “awesome girls in bands,” “women of noise,” and “grungebook.” (*Id.*) The image also appears multiple times on Pinterest without attribution (*Id.* ¶ 68).

agreed to these terms and therefore understood that (1) Instagram could transfer the license given to it to others, and (2) that once content was posted on Instagram, it would be shared with and by others. Yet he took no action to stop any further dissemination. McNatt's undeniable knowledge of the Instagram terms of use, and the loss of control over further dissemination of images once posted, is evidenced by his September 11, 2014 screenshot of Prince's Instagram post containing the *Portrait of Kim Gordon*, posted to McNatt's Facebook page. In it, McNatt mocked Instagram's "copyright rules," and called Instagram a "treasure trove" of copyrighted material. (*Id.* ¶ 66).

To this day, a digital image of the Photograph appears on McNatt's website without any watermark embedded in the image. (*Id.* ¶ 63). While the download of the Photograph is preceded by a page that identifies McNatt as the author, the Photograph itself is unobscured and capable of endless reproduction. (*Id.* ¶ 64).

2. McNatt's Sales of the Photograph

McNatt has never (1) created or sold *any prints* of the Photograph, or (2) pursued any large-scale public display of the Photograph. (*Id.* ¶ 73). Aside from his \$100 payment from *Paper Magazine* for both the photoshoot of Kim Gordon and use of the Photograph, McNatt licensed (without authorization from Ms. Gordon) the Photograph on only one other occasion: in February 2015 to website VOGUE.com for [REDACTED]. (*Id.* ¶ 75). Other inquiries for use of the Photograph were made by representatives of *Billboard* and *Rolling Stone* in February 2015, and by VOGUE.com in March 2016, but none panned out, in part because McNatt understood that "it was going to take too long" to obtain Ms. Gordon's permission—which he never obtained—to re-use the image. (*Id.* ¶ 76). Notably, all such inquiries were made *after* Prince created his *Portrait of Kim Gordon* in September 2014, and the latter was made after Prince displayed his Portrait at the Exhibition in April 2015.

McNatt also has never created any derivative works incorporating the Photograph and admits that he is not aware of any opportunities that he lost as a result of Prince's fair use of a portion of an

image of the Photograph. (*Id.* ¶ 74). To the contrary, McNatt’s potential to profit off his photography has only been enhanced as a result of the fame he garnered through Prince’s use of the image of the Photograph and this lawsuit. (Boyajian Decl. Ex. 4 at 77:21-79:8; Boyajian Decl. Ex. 46 ¶ 33).

3. McNatt Himself Participates in Copying and Disseminating the Protected Work of Others on Social Media

Although McNatt alleges infringement by defendants, his own conduct with respect to the images of others demonstrates his understanding of how social media is used. Specifically, McNatt admits that, consistent with practices on social media, he has posted images of photographs on social media that he did not take, and without express permission from other photographers to do so. (*Id.* ¶ 85).

[REDACTED]

ARGUMENT

I. LEGAL STANDARDS

A. Summary Judgment

The Court is well-familiar with the standard for granting a motion for summary judgment, and so we will not repeat it here. *See* Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Notably, while the fair use defense “is a mixed question of law and fact,” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985), courts may—and often do—“resolve issues of fair use at the summary judgment stage where there are no genuine issues of material fact.”

Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 608 (2d Cir. 2006) (affirming district court’s decision granting summary judgment in favor of publishers on fair use defense) (citing *Wright v. Warner Books, Inc.*, 953 F.2d 731, 735 (2d Cir. 1991)).⁷

B. The Law of Fair Use

The 1976 Copyright Act provides that “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . ., scholarship, or research, is not an infringement of copyright.” 17 U.S.C. § 107. Courts conduct this inquiry by considering four non-exclusive factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107. The factors are “illustrative and not limitative” and “provide only general guidance.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994); *see also Castle Rock Ent’m’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 146 (2d Cir. 1998) (“[T]he four statutory fair use factors are non-exclusive and serve only as a guide to promote the purposes underlying the copyright law.”). Courts undertake a “case-by-case analysis” in which each factor is considered, “and the results [are] weighed together, in light of the purposes of copyright.” *Campbell*, 510 U.S. at 577-78.

As this Court previously noted, the “doctrine of ‘fair use’ is an important limitation on the original creator’s monopoly rights.” *Graham v. Prince*, 265 F. Supp. 3d 366, 376 (S.D.N.Y. 2017) (“*Graham P*”). As Judge Pierre Leval wrote in his seminal article on the topic, “[f]air use should not be

⁷ *See also, e.g., Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (vacating district court’s denial of summary judgment to Prince, finding that 25 of 30 works considered on summary judgment were entitled to a fair use defense); *Blanch v. Koons*, 467 F.3d 244, 259 (2d Cir. 2006) (affirming district court’s decision granting summary judgment to artist Jeff Koons on the basis of fair use); *Authors Guild, Inc. v. Google Inc.* (“*Google Books*”), 804 F.3d 202 (2d Cir. 2015) (affirming district court’s grant of summary judgment in favor of defendant search engine on fair use grounds); *Authors Guild, Inc. v. HathiTrust* (“*HathiTrust*”), 755 F.3d 87 (2d Cir. 2014) (same); *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73 (2d Cir. 2014) (same); *Hollander v. Steinberg*, 419 F. App’x 44 (2d Cir. 2011) (summary order) (same).

considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design.” Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1110 (1990) (“Leval”).

II. PRINCE’S *PORTRAIT OF KIM GORDON* IS A FAIR USE OF THE PHOTOGRAPH

A. Prince’s *Portrait of Kim Gordon* Is Highly Transformative

In considering the first statutory factor—the “purpose and character” of the secondary use, 17 U.S.C. § 107(1)—the primary inquiry is whether the secondary use is “transformative,” that is, “whether the new work merely supersedes the objects of the original creation, . . . or instead adds something new, with a further purpose *or* different character, altering the first with new expression, meaning, *or* message[.]” *Campbell*, 510 U.S. at 579 (internal quotation and alteration marks omitted) (emphasis added). The Supreme Court’s use of the disjunctive—“or”—indicates that the transformative nature of a work can arise from myriad techniques, aesthetics, and intent. If a use is transformative, it is “the very type of activity that the fair use doctrine intends to protect for the enrichment of society.” *Cariou*, 714 F.3d at 706 (quoting *Castle Rock*, 150 F.3d at 142). Here, Prince’s *Portrait of Kim Gordon* has both a different purpose *and* a different character from the Photograph, and is thus transformative as a matter of law.

1. *Portrait of Kim Gordon* Has a Different Purpose from the Photograph

Prince’s purpose in creating *Portrait of Kim Gordon*, along with the other *New Portraits* works, is significantly different from McNatt’s purpose in taking the Photograph. As Prince stated, his intent in creating the *Portrait of Kim Gordon* was to “comment[] on the social media, the whole idea of putting up images on a new platform that was available to anyone, to an entire population[.]” (UF ¶ 18; *see* Section 1.B, *supra*). Prince focused on how these images were “recontextualized” by the new language emerging in this digital space, a mix of nonsense, slang, hyperbole and image-based emojis. (Prince Decl. ¶¶ 9, 31; Boyajian Decl. Ex. 8 ¶¶ 39, 44). His purpose was not to merely reproduce the

image present in each *New Portrait*; rather, it was to satirize and provide commentary on the manner in which people today communicate, present themselves, and relate to one another through social media. (Prince Decl. ¶ 31). Prince’s work allows viewers and gallery visitors to step into a physical manifestation of that virtual world, which only exists in cyberspace and is typically viewed on handheld devices. While an artist’s “clear conception of his reasons for using” a work, and “his ability to articulate those reasons,” are not “*sine qua non* for a finding of fair use,” see *Blanch*, 467 F.3d at 255 n. 5, the evidence of Prince’s intent is uncontroverted, and highly relevant. See *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F. Supp. 2d 499, 507-08 (S.D.N.Y. 2009) (“The Second Circuit has given weight to an artist’s own explanation of their creative rationale when conducting fair use analysis”) (citing *Blanch*, 467 F.3d at 255); *Graham I*, 265 F. Supp. 3d at 382 (“[A]lthough an artist’s stated intent is ‘not dispositive’ in determining whether his or her work is transformative, it is also not irrelevant.”) (quoting *Cariou*, 714 F.3d at 707).

This purpose is a world away from McNatt’s purpose in making the Photograph, which was to comply with the specific creative directives provided by *Paper* Magazine to document Kim Gordon in connection with an interview in *Paper*. (See UF ¶¶ 53-54). According to *Paper*’s former Editorial Director, McNatt faithfully followed those instructions, producing a photograph of Ms. Gordon that was in line with the other photographs in the series. (Boyajian Decl. Ex. 49 at 52:5-9). The Photograph “focuses intensively on the subject, and attempt[s] to honor or ‘reveal’ something about that individual,” thus both literally and figuratively “documenting” its subject. (Boyajian Decl. Ex. 8 ¶ 45; Boyajian Decl. Ex. 13 ¶ 3). By contrast, Prince’s reframing of Ms. Gordon’s image in the Instagram frame – a context in which McNatt himself had not placed the image – with the addition of his commentary, “focuses more on the perceptions of the viewer as the creator of meaning about the individual” (Boyajian Decl. Ex. 8 ¶ 45), i.e., evokes a more complex inner dialogue about the painting’s

meaning. Prince’s temporary “adopt[ion]” of the “personality” of the subject of the image by playing on lyrics and using musical emojis as he made his own comments (Prince Decl. ¶ 19) stands in stark contrast to McNatt’s “mute” Photograph. (Boyajian Decl. Ex. 8 ¶ 39). In any case, no one would mistake McNatt’s Photograph as commenting on social media or internet culture. Thus, it is indisputable that the *Portrait of Kim Gordon* adds a “further purpose” to that of the Photograph. *Campbell*, 510 U.S. at 579; *see also Blanch*, 467 F.3d at 252-53.⁸

In this way, *Blanch* is analogous. In *Blanch*, the defendant, appropriation artist Jeff Koons, testified that he had transformed the photograph at issue by using it as “fodder for his commentary on the social and aesthetic consequences of mass media.” *Blanch*, 467 F.3d at 253.⁹ This purpose contrasted sharply with the plaintiff’s intent, which was “to show some sort of erotic sense...to get...more of a sexuality to the photographs.” *Id.* The pertinent question, according to the Second Circuit, was “whether Koons had a *genuine creative rationale* for borrowing Blanch’s image, rather than using it merely ‘to get attention or to avoid the drudgery in working up something fresh.’” *Id.* at 255 (emphasis added).¹⁰ Having answered that question affirmatively, it was not the court’s “job to judge the merits of [Koons’s work], or of Koons’s approach to art.” *Id.* at 255. The court concluded that Koons had “establish[ed] a ‘justification for the very act of his borrowing,’” and provided no reason to doubt that “the use of an existing image advanced his artistic purposes.” *Id.*

Here, as in *Blanch*, the *Portrait of Kim Gordon* “adapt[s]” the Photograph “with changes of its colors, the background against which it is portrayed, the medium, the size of the objects pictured, the

⁸ (“But Koons asserts—and Blanch does not deny—that his purposes in using Blanch’s image are sharply different from Blanch’s goals in creating it... The sharply different objectives that Koons had in using, and Blanch had in creating, ‘Silk Sandals’ confirms the transformative nature of the use.”)

⁹ The Court quoted Koons’ declaration in support of summary judgment in which he stated: “The ubiquity of the photograph is central to my message. The photograph is typical of a certain style of mass communication... something that everyone experiences constantly... By using an existing image, I also ensure a certain authenticity or veracity that enhances my commentary—it is the difference between quoting and paraphrasing—and ensure that the viewer will understand what I am referring to.” *Id.* Koons further “want[ed] the viewer to think about his/her personal experience with these objects, products, and images and at the same time gain new insight into how these affect our lives.” *Id.* at 252.

¹⁰ *See also id.* at 253 (use of a work as “‘raw material’ ... in the furtherance of distinct creative or communicative objectives” is transformative).

objects’ details and, crucially, their entirely different purpose and meaning—as part of a massive painting...for exhibition in a[n]...art-gallery space.” *Blanch*, 467 F.3d at 253. Prince employs McNatt’s image to comment on social media, just as Koons used Blanch’s image for his commentary on “the social and aesthetic consequences of mass media.” *Blanch*, 467 F.3d at 253. And, like Koons, Prince needed to borrow a preexisting image that “was typical of a certain style of mass communication” (i.e., on social media), to ensure “that the viewer will understand what [he was] referring to,” and to give his commentary “‘authenticity’” and “‘veracity.’” *Id.* at 255. As the court held in *Blanch*, it is unnecessary to “judge the merits” of *Portrait of Kim Gordon* or Prince’s “approach to art.” *Id.* It is undisputed that Prince had a “genuine creative rationale,” *id.*, for using the image of the Photograph in *Portrait of Kim Gordon*.

2. *Portrait of Kim Gordon* Has a Different Character from McNatt’s Photograph

Prince’s distinct purpose for creating the *Portrait of Kim Gordon* bears out in the character of the painting, which is also different from the character of the Photograph. As a preliminary matter, an appropriate comparison of the works at issue should focus not solely on the photographic element of the works, but rather, the entirety of the works. In fact, merely adding features around a work, to provide it with a different context, can be just as highly transformative as altering or modifying the work itself. *See, e.g., Bill Graham*, 448 F.3d at 609-11 (considering the elements surrounding the copyrighted works in concluding the exact reproductions were fair use); *Mattel Inc. v. Walking Mt. Prods.*, 353 F.3d 792, 796, 804 (9th Cir. 2003) (holding that an exact and complete reproduction of Barbie dolls in “various absurd and often sexualized positions” was transformative fair use, where defendant “add[ed] to [the doll] by creating a context around it and capturing that context in a photograph”).¹¹ This is what Prince accomplished here. First, Prince did not simply re-photograph a

¹¹ The Ninth Circuit declined to “ignore context – both the social context of [defendant’s] work and the actual context in which Mattel’s copyrighted works are placed in [defendant’s] photographs” because “‘in parody, as in news reporting, context is everything.’” *Id.* at 802 (quoting *Campbell*, 510 U.S. at 588). The “caution” against “dissect[ing]” components of

unique *photograph*, but an entire *a post* from Instagram, which had been circulating on social media. (Boyajian Decl. Ex. 8 ¶ 46). Moreover, the often-provocative text, the colorized emojis, and the other colorized iconography in the *New Portraits* make the viewer look *around* the image (Boyajian Decl. Ex. 50 at 261:3-262:25),¹² reducing the artistic or intellectual importance of the photographic image relative to its physical portion of the painting. Additionally, as discussed in Section B, *supra*, the *Portrait of Kim Gordon* “employs new aesthetics,” *Cariou*, 714 F.3d at 707-08, through a variety of techniques: (1) the novel canvas, causing the ink to “sit” on top of it and the image to appear out of focus; (2) the three-dimensional look and feel; (3) the colored inks used to inkjet the *New Portraits* onto canvas, resulting in a different coloration from the original images (including black and white images such as the Photograph); (4) the absurdly-proportioned scale and *Alice in Wonderland*-dreamlike quality of the *New Portraits*, along with the intentional cropping of images in an homage to Andy Warhol; and (5) Prince’s addition of comments in his signature style, complete with themed emojis. These self-referential comments—Prince’s “inside joke” with his good friend Kim Gordon (UF ¶ 25)—provide a vastly different context to the image of Ms. Gordon as it was presented in *Paper* magazine, resulting in dramatically different conclusions drawn by the viewer. (Boyajian Decl. Ex. 51 ¶ 12; *see also* Boyajian Decl. Ex. 14 at 184-85, 301-303 (acknowledging that a caption “adds more information to the photograph”). And, given Prince’s prominence in the art world, the *New Portraits* become much more about his comments than they do the images. (Boyajian Decl. Ex. 8 ¶¶ 27-29, 38-39, 48).

The comments further alter the impact of the Photograph on the viewer in the reaction they provoke. While the Photograph is intended to comply with the creative directives of *Paper* in creating

works, in lieu of “compar[ing] the works’ total concept and overall feel,” “instructed by [] good eyes and common sense,” has also been employed in the substantial similarity analysis of *prima facie* infringement. *See Stiles*, 801 F. Supp. 2d 233, 239 (S.D.N.Y. 2011) (Stein, J.) (internal quotation marks and citation omitted).

¹² Indeed, McNatt’s proffered expert agreed that artists will often use up large portions of their canvas to draw the viewer’s attention to a much smaller object on their canvas. (Boyajian Decl. Ex. 14 at 240:14-16).

a “ [REDACTED] ” (UF ¶¶ 53-54), producing a visually pleasing image, the *Portrait of Kim Gordon* instead invites the viewer to examine and consider what is actually being depicted in the work of art, considering both the image and the comments together. It is this type of intellectual stimulation (rather than emotional response) that is the hallmark of contemporary art.

The transformative purpose and character of *Portrait of Kim Gordon* “may reasonably be perceived,” see *Cariou*, 714 F.3d at 707,¹³ by reasonable observers in a side-by-side comparison with the Photograph, particularly when each of the works are viewed as they were most often viewed by the public (rather than in photocopied reproductions).¹⁴ While neither *Cariou* nor subsequent authority specifically discuss who the “reasonable observer” would be, Prince submits that in the art context, the transformativeness of a work should be assessed through the lenses of a person who has general interest in and appreciation of, but not specialized knowledge of, the arts. (Boyajian Decl. Ex. 52 at 160-64; Boyajian Decl. Ex. 4 at 139-40; Boyajian Decl. Ex. 53 at 168). Such observers would have no difficulty discerning Prince’s messages and meanings related to the social media phenomenon in *Portrait of Kim Gordon*, and would recognize and consider the presence of the Instagram frame elements, the large-scale, three-dimensional simulation of a smartphone, or Prince’s undoubtedly meaningful (even if somewhat cryptic) comments. (Boyajian Decl. Ex. 54 ¶ 3; Boyajian Decl. Ex. 51 ¶¶ 10-12). That a reasonable observer would appreciate the transformative character of *Portrait of Kim Gordon* is further demonstrated by (1) the fact that LACMA—one of the most important museums in the country—featured one of the *New Portraits* in a 2018 Richard Prince retrospective and acquired the painting for its permanent collection (Boyajian Decl. Ex. 6); and (2) the actual owner of the *Portrait of Kim Gordon*

¹³ *Campbell’s* and *Cariou’s* use of the passive voice – “may reasonably be perceived,” see *Campbell*, 510 U.S. at 583; *Cariou*, 714 F.3d at 707 – suggests that the court is to determine, particularly as here, in the art context, whether there is any subset of the “reasonable observer” that might perceive a transformative purpose or character, not whether all reasonable observers might do so. McNatt’s proffered expert agrees. (Boyajian Decl. Ex. 55 at 92:23-94:22).

¹⁴ For this reason, Prince has submitted a full-size, exact reproduction of the *Portrait of Kim Gordon* for the Court’s review and analysis. Notably, each of Prince’s art experts viewed the original *New Portraits* in person when they were originally exhibited, and viewed the replica of *Portrait of Kim Gordon* during the course of this litigation. By contrast, none of McNatt’s proffered experts have seen—or requested to see—the *Portrait of Kim Gordon* in person.

perceives a significant transformation of the Photograph in the *Portrait of Kim Gordon*. (Boyajian Decl. Ex. 19 ¶ 6). Moreover, when viewed in context—among the dozens of *New Portraits* all evoking a similar social-media motif, which is how the works were displayed—the purpose and character of *Portrait of Kim Gordon* would be even more apparent.

Finally, given Prince’s uncontroverted testimony about his intended meaning and purpose behind the *New Portraits* series in general and the *Portrait of Kim Gordon* specifically, the “reasonable observer” test at the very least lends support to Prince’s stated “genuine creative rationale for borrowing [McNatt’s] image,” *see Blanch*, 467 F.3d at 255, as opposed to merely a *post hoc* justification for doing so.

3. *Portrait of Kim Gordon is Transformative Despite Borrowing the Image of the Photograph and Not Obscuring It*

In *Graham I*, this Court relied heavily on *Cariou* in denying Prince’s motion to dismiss.¹⁵ Constrained to the allegations in the pleadings, and applying the “reasonable observer” test, the Court “conclude[d] that Prince’s [work] does not so ‘heavily obscure[] and alter[]’” the plaintiff’s photograph to make it “barely recognizable.” *Graham I*, 265 F. Supp. 2d at 381. Rather, the court found Prince’s “alterations” to the plaintiff’s photograph to be “materially less significant than those that were found to be insufficiently transformative to clearly warrant a finding of fair use in *Cariou*.” *Id.* Prince respectfully submits that, on *summary judgment*, the rationale underpinning the Second Circuit’s decision to remand a small number of works in *Cariou* does not fit the circumstances of this case, given the undisputed factual record here.

The Second Circuit recently held that a “secondary work ‘can be transformative in function or purpose without altering or actually adding to the original work.’” *Swatch Grp. Mgmt. Servs. Ltd.*, 756

¹⁵ Defendants in the instant litigation also filed a motion to dismiss on similar grounds (ECF No. 22) that was withdrawn by prior counsel after the Court’s order in *Graham I* (ECF No. 50).

F.3d at 84. For instance, even where a plaintiff's work is faithfully reproduced with minimal or no alterations, a defendant's fair use can have new expression, meaning, or message merely by juxtaposing the work with additional text, or artistic or other features, to provide context to the old work and fulfill the new purpose.¹⁶ This was the case in *Bill Graham*, where the Second Circuit held that the publishers of a book about the Grateful Dead made fair use of plaintiff's concert posters in the book, by "combining" the plaintiff's minimally-altered, reduced-size images "with a prominent timeline, textual material, and original graphical artwork, to create a collage of text and images" to fulfill the defendant's purpose. 448 F.3d at 607, 611. In other cases, the works are used for a wholly new purpose enabled by new technology, such as to provide for a more effective search engine of books or images,¹⁷ or to check student-submitted papers for potential plagiarism.¹⁸ Exact copying can further be fair use where the copied material is a "factual depiction" that has previously been published online without any copyright notice or watermark.¹⁹ Underlying all of these examples is the Supreme Court's pronouncement that "the extent of permissible copying varies with the purpose and character of the use." *Campbell*, 510 U.S. at 586.

¹⁶ See, e.g., *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, (1st Cir. 2000) (newspaper's use of near-naked photos of beauty pageant winner were fair use when shown "not just to titillate, but also to inform" a controversy concerning the appropriateness of those photos; defendant "reprinted the pictures not just to entice the buying public, but to place its news articles in context"); *Mattel*, 353 F.3d at 804 (holding that defendant photographer's exact and complete reproduction of the copyrighted Barbie design, depicted in various absurd and often sexualized positions" in his art was a fair use, and that the defendant "present[ed] the viewer with a different set of associations and a different context for this plastic figure...short of severing the doll, [the defendant] must add to it by creating a context around it and capturing that context in a photograph."); *Philpot v. Media Research Ctr. Inc.*, 279 F. Supp. 3d 708, 717 (E.D. Va. 2018) (use of exact, unobscured copies of plaintiff's professional photographs of celebrities that support a particular political agenda found to be transformative and fair use because the images were used "in a completely different context" on the website).

¹⁷ See, e.g., *Google Books*, 804 F.3d at 214, 217 (Google's text-searchable database of complete, unaltered books, to provide "snippets" of books containing terms in response to searches, was transformative in that it "communicate[d] something new and different from the original," and that "the result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn."); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (Google's use of copyrighted images in thumbnail search index was "highly transformative" even though the images themselves were not altered, in that the use served a different function than the images served); *Kelly v. Arriba Soft*, 336 F.3d 811 (9th Cir. 2003) (holding that exact replications of a photographer's images into smaller, lower-resolution thumbnail images was transformative, because the smaller images served an entirely different function and purpose than the original images).

¹⁸ *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 639 (4th Cir. 2009) ("*Vanderhye*") (holding that defendant's "use of a copyrighted work need not alter or augment the work to be transformative in nature. Rather, it can be transformative in function or purpose without altering or actually adding to the original work.").

¹⁹ *Brammer v. Violent Hues Prods., LLC*, 1-17-cv-01009, 127 U.S.P.Q.2D (BNA) 1053, 2018 WL 2921089, at *2 (E.D. Va. June 11, 2018), *appeal filed*, No. 18-1763 (4th Cir. July 9, 2018) (defendant "found the photo online and saw no indication that it was copyrighted...thus believ[ing] the photo was publicly available"); see also *Stewart v. Abend*, 495 U.S. 207, 237 (1990) ("In general, fair use is more likely to be found in factual works than in fictional works.").

Here, as a matter of law, the purpose and character of Prince’s use permits copying of preexisting images without the substantial alterations present in many works in *Cariou*. Unlike *Cariou*, where Prince had testified that his work “do[es]n’t really have a message” and that he was not “trying to create anything with a new meaning or a new message,” 714 F.3d at 707, Prince’s intended meaning and purpose behind the *New Portraits* works is of record and is undisputed. This meaning and purpose—to forensically capture interaction on social media, which largely consists of reposting and commenting on others’ images (Boyajian Decl. Ex. 56 at 112)—was different from that in *Cariou*, which related to a “post-apocalyptic screenplay” portraying “a contemporary take on the music scene.” 714 F.3d at 707. Accordingly, the transformative techniques Prince used in the *New Portraits* series ***had to be*** less invasive than those used in *Cariou* to carry out his stated purpose. Indeed, the cropping of each image used in the *New Portraits* to an approximate 41 x 41 inch square was necessary to pay adequate homage to Andy Warhol, and cropping any further portion, or cutting, painting over, or obscuring them as Prince did in many images in *Cariou*, would have significantly inhibited Prince’s commentary on Instagram users’ engagement, because they would no longer resemble “real” posts. For at least these reasons, despite facially “minimal” alterations to the photographic element of the *Portrait of Kim Gordon*, Prince’s use of the Photograph is sufficiently transformative for the first factor to weigh in its favor as a matter of law.

4. The Public Benefit of Art Far Outweighs any Commercial Gain from the *Portrait of Kim Gordon*

That Prince profited from the one-time sale of the *Portrait of Kim Gordon* does not diminish that the purpose and character of the use was fair. Indeed, “nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research ... ‘are generally conducted for profit,’” *Campbell*, 510 U.S. at 584 (quoting *Harper & Row*, 471 U.S. at 592). And, “[t]he more transformative the new work, the less will be the significance

of other factors, like commercialism, that may weigh against a finding of fair use.” *Id.* at 579. “It can hardly be said, moreover, that [Prince’s] economic gains from [the *Portrait of Kim Gordon*] were ‘to the exclusion of broader public benefits.’” *Blanch*, 467 F.3d at 254.

As the Second Circuit noted, “[n]otwithstanding the fact that artists are sometimes paid and museums sometimes earn money, the public exhibition of art is widely and we think properly considered to ‘have value that benefits the broader public interest.’” *Id.*; *see also* 20 U.S.C. § 951 (“access to the arts and the humanities” fosters “wisdom and vision” and makes citizens “masters of their technology and not its unthinking servants”). [REDACTED]

[REDACTED]. This public benefit, coupled with the substantially transformative nature of the *Portrait of Kim Gordon* (as described above), militates in favor of a finding of fair use.

5. The Nature of the Copyrighted Work and the Amount and Substantiality of the Portion Used Are Less Significant in the Context of the Instant Case

In analyzing the second statutory factor—“the nature of the copyrighted work,” 17 U.S.C. § 107(2) — the Second Circuit considers “whether the [original] work is expressive or creative,” and “whether the work is published or unpublished, with the scope for fair use involving unpublished works being considerably narrower.” *Cariou*, 714 F.3d at 709-10 (citations omitted). However, “the second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose.” *Blanch*, 467 F.3d at 257 (quoting *Bill Graham*, 448 F.3d at 612).²⁰ Also, courts “limit[] the weight ... placed on this [second] factor” where the plaintiff’s works “have been published extensively.” *Bill Graham*, 448 F.3d at 612; *see also, e.g., New Era Publ’ns Int’l, ApS v. Henry Holt & Co.*, 695 F. Supp. 1493, 1501 (S.D.N.Y. 1988) (“[A]t common law, because fair use was understood

²⁰ For example, even a work with facially “expressive content,” such as a design or photo, may be used for its “factual content,” for instance, to document its existence and use in historical context. *See Bouchat v. Baltimore Ravens Ltd. P’ship*, 619 F.3d 301, 314 (4th Cir. 2010).

as predicated on the author’s implied consent expressed through publication of his work, there had been no right of fair use where there was no prior publication.”).

Here, the nature of the Photograph is more factual than creative. It is undisputable that the Photograph was a commissioned, commercial photograph, taken in line with specific creative directives. (UF ¶¶ 53-54). McNatt was not engaging in social commentary. While Prince does not dispute that the Photograph is worthy of copyright protection, McNatt’s aim was to document Ms. Gordon in the manner directed by *Paper*. (Boyajian Decl. Ex. 13 ¶ 3; Boyajian Decl. Ex. 14 at 64). Moreover, it is undisputed that the Photograph was not only published, but also that it was widely disseminated. (UF ¶¶ 67-70). The fact that the Photograph was widely published and largely factual (i.e., authentically capturing its subject) in nature weighs in favor of finding fair use.²¹ Even if the Photograph were considered more creative than factual, the *Portrait of Kim Gordon* would still be fair use because (as explained above and below) Prince used the Photograph “in a transformative manner to [make a] comment...rather than to exploit its creative virtues.” *Blanch*, 467 F.3d at 257. What Prince exploits, instead, is social media—and his ability to communicate with his old friend, in this new way.²²

Like the second fair use factor, the third factor—“the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” 17 U.S.C. § 107(3)—also depends on the degree to which the use is transformative, as “the extent of permissible copying varies with the purpose and character of the use.” *Campbell*, 510 U.S. at 586. Thus, the analysis of the third factor necessarily intertwines with the degree to which the work is transformative under the first factor. *See Cariou*, 714 F.3d at 710 (because Prince’s works were so thoroughly transformative, the third factor weighed

²¹ *See Stewart*, 495 U.S. at 237; *Brammer*, 2018 WL 2921089, at *2-3 (holding that while plaintiff’s time-lapsed photograph “contained creative elements,” because it “was also a factual depiction of a real-world location,” it was more likely to be the subject of a fair use than an entirely creative work, and further holding that the scope of fair use was “broadened” because it was undisputed that plaintiff “previously published the photograph on several websites...and at least one of these publications did not include any indication that it was copyrighted.”).

²² This is underscored by the fact that the social media elements of the *New Portraits* are what are consistent among the series – not the images, which merely set the stage for Prince’s commentary. It is the social media elements and Prince’s commentary that imbue the works with meaning, as evidenced by the fact that each of the paintings at the Exhibition were priced identically, regardless of the image within the Instagram frame. (Boyajian Decl. Ex. 57 ¶ 64].

“heavily” in Prince’s favor even though Prince had made use of the “entire source photograph[s]” in some of the works). In some instances, “copying the entirety of a work is sometimes necessary to make a fair use of the image.” *Bill Graham*, 448 F.3d at 613. Thus, the more important inquiry underlying the third factor is whether the use is “reasonable in relation to the purpose of the copying,” *Campbell*, 510 U.S. at 586, an inquiry which again touches upon the first factor.

Here, the *Portrait of Kim Gordon* incorporates a cropped image of the Photograph: part of the torso and hair of Ms. Gordon, both from the top and bottom, has been removed. (UF ¶ 11; Boyajian Decl. Ex. 56 at 125-26). Additionally, a significant amount of negative space that appeared in the Photograph does not appear in the *Portrait of Kim Gordon*, altering the Photograph’s meaning and impact. (Boyajian Dep. Ex. 14 at 100-103; *see also* Boyajian Decl. Ex. 56 at 125-26). The portions of the image of the Photograph that do remain in the *Portrait of Kim Gordon* were necessary to accomplish Prince’s transformative purpose—to capture and comment on the nature of social media posts as a communication tool, which type of creative expression serves the purpose of copyright.²³ (Boyajian Decl. Ex. 54 ¶ 4]. While the image of Kim Gordon in the *Portrait of Kim Gordon* is not a selfie, because Prince’s comments are an “inside joke” between Prince and his friend, intended to intimately capture them, in a sense, the whole painting *is* a kind of selfie. (UF ¶ 25; Prince Decl ¶ 12).

Like other users who take and post selfies, Prince’s goal with the *New Portraits* was to contemporaneously and accurately capture the moment. The fact that some of the changes to the image of the Photograph may have been made automatically at the time the image was uploaded to Instagram is inconsequential to Prince’s work as a fair use; to the contrary, had Prince done anything to alter the post from how it would have appeared on Instagram (e.g., the photograph in the shape of a square

²³ The Supreme Court, over thirty years ago, recognized that exact copying, in light of new technological developments, can serve the purposes of copyright where there was no harm—past or likely—to the content creators. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 430-31 (1984) (holding that “[w]hen technological change has rendered [the Copyright Act’s] terms ambiguous, the Copyright Act must be construed in light of [its] basic purpose,” “to stimulate artistic creativity for the general public good.”). Indeed, the fair use doctrine is designed such that it can adapt to changing times.

rather than a rectangle, the Instagram iconography, Instagram “text”), that would have detracted from his intention to effectively capture the medium of communication, including the free-flowing nature of the circulation of images. As in *Bill Graham*, Prince used an unobscured copy of the copyrighted image to accomplish his fair use purpose by, among other things, “intermingl[ing]” existing visuals with his original contributions (e.g., addition of text, emoji, large-scale production, etc.). *Bill Graham*, 448 F.3d at 613. And like Koons, Prince needed to use the image as it was found on Instagram—that is, in a post—to “ensure a certain authenticity or veracity that enhances [his] commentary.” *Blanch*, 467 F.3d at 253 (quoting Koons’ declaration in support of summary judgment).

In sum, the use of the Photograph is altogether necessary to accomplish Prince’s artistic vision, and at the very least, reasonable in relation to the purpose to which it is put in *Portrait of Kim Gordon* and the rest of the *New Portraits* series.

B. Portrait of Kim Gordon Does Not Adversely Impact the Market for McNatt’s Photograph

The fourth factor “is undoubtedly the single most important element of fair use.” *Harper & Row*, 471 U.S. 539 at 566. The fourth factor’s predominance stems from its intrinsic connection to the fundamental reason for copyright: to provide an economic incentive for authors to produce. *Google Books*, 804 F.3d at 223; *Harper & Row*, 471 U.S. at 558 (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”).

The only harm cognizable under the fourth factor is the harm of market substitution. See *HathiTrust*, 755 F.3d at 96 (“cognizable market harm” is limited to “market substitution”) (quoting *Campbell*, 510 U.S. at 591). Thus, the relevant consideration is “whether the secondary use *usurps* the market of the original work,” *Cariou*, 714 F.3d at 708 (quoting *Blanch*, 467 F.3d at 258) (emphasis added). “[A]n accused infringer has usurped the market for copyrighted works, including the derivative market, where the infringer’s target audience and the nature of the infringing content is the same as

the original.” *Cariou*, 714 F.3d at 709 (emphasis added). And, “[t]he market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop.” *Campbell*, 510 U.S. at 592.²⁴ Furthermore, market substitution is cognizable under the fourth factor only when it is *significant*. *Google Books*, 804 F.3d at 223-24 (question under fourth factor is whether the second work is a “*significantly* competing substitute”) (emphasis added). For example, in *Google Books*, the Second Circuit acknowledged that Google’s snippet search function “can cause *some* loss of sales” to authors. *Id.* at 224 (emphasis in original). But as the court explained, “the possibility, or even the probability or certainty, of some loss of sales does not suffice to make the copy an effectively competing substitute that would tilt the weighty fourth factor in favor of the rights holder in the original. There must be a meaningful or significant effect “upon the potential market for or value of the copyrighted work.” *Id.* In this case, analysis of the fourth factor compels the determination that *Portrait of Kim Gordon* is a fair use of the Photograph for a number of reasons.

1. McNatt Lacks the Model Release to Commercially Exploit—as he has Knowingly done without Authorization—Kim Gordon’s Image and Likeness

First, as discussed in Section D.1.b, *supra*, McNatt did not obtain the model release required to further exploit Ms. Gordon’s image and likeness captured in the Photograph. Ms. Gordon is a resident of California. (Gordon Decl. ¶ 1). Therefore, her right of publicity is governed by California law. *See Southeast Bank, N.A. v. Lawrence*, 66 N.Y.2d 910, 912 (1985) (right of publicity issues governed by the law of the subject’s domicile); Cal. Civ. Code § 3344(a); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992) (protecting Vanna White’s identity beyond name, image, and likeness). Where depictions of celebrities are reproduced without authorization, and are “little more than the appropriation of the celebrity’s economic value,” that use violates the right of

²⁴ *See also Twin Peaks Prods., Inc.*, 996 F.2d at 1377 (fourth factor favors a defendant where his work “fills a market niche that plaintiff has no interest in occupying.”).

publicity. See *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 400 (Cal. 2001) (finding that such a use would also not be protected by the First Amendment).

Ms. Gordon has unequivocally stated that she did not and will not provide McNatt permission to further exploit her image. (UF ¶ 83). Since further sale or licensing of McNatt’s Photograph would be a misappropriation of Ms. Gordon’s right of publicity, there is therefore no legitimate market to be impacted. In this way, this case is akin to *Vanderhye*, which involved the unauthorized reproduction of student papers in order to check for plagiarism. In *Vanderhye*, plaintiffs had argued that defendants’ archiving of their papers “impaired the sale of the papers to high school students in the market for unpublished term papers, essays and the like.” 562 F.3d at 644. However, the plaintiffs also testified that “they would not sell the works at issue here to any dealer in such a market because such a transaction would make them party to cheating and would encourage plagiarism,” *id.*—i.e., participants in an illegitimate market. In the court’s view, this type of “harm” “is not of the kind protected against by copyright law.” *Id.*

Similarly, Prince’s use of the Photograph in his *Portrait of Kim Gordon*, could not impact any *legitimate* market for the Photograph, since McNatt’s unauthorized exploitation of Ms. Gordon’s likeness would be—and has been—unlawful. This alone requires a finding in Prince’s favor on the fourth statutory fair use factor.

2. The *Portrait of Kim Gordon* does not Usurp the Market for the Photograph because the Works Exist in Entirely Distinct Markets

Even if McNatt did have the right to exploit Ms. Gordon’s image, the fourth factor would weigh in Prince’s favor because the *Portrait of Kim Gordon* does not “usurp” the market for the Photograph. *Cariou*, 714 F.3d at 709. As in *Cariou*, the record establishes that “Prince’s work appeals to an entirely different sort of collector than” McNatt’s photographs. *Id.*

In the first place, *Portrait of Kim Gordon* was a single-edition work that is owned by an

individual who would not have purchased or displayed the Photograph. (Boyajian Decl. Ex. 19 ¶ 7).²⁵ Therefore, by definition, the painting cannot have an adverse impact on the market for Photograph.

Second, the “target audience” (*Cariou*, 714 F.3d at 709) or consumer for the Photograph and the *Portrait of Kim Gordon* are vastly different.²⁶ Notably, McNatt has never created or sold *even a single print* of the Photograph. (See generally Compl. ¶¶ 16-21.) Prince’s *Portrait of Kim Gordon* appeals to a collector of contemporary art. Indeed, even McNatt’s proffered experts agree that those who purchase Prince’s work have a strong interest in precisely that: owning a Prince work in general, and more specifically, a work from the groundbreaking *New Portraits* series. (Boyajian Decl. Ex. 14 at 235). The Photograph, on the other hand, has only appealed to, and is available for license by, commercial and editorial magazines who wish to use it in their publications.²⁷ That the target audiences are different is best illustrated by the undisputed fact that the actual owner of the *Portrait of Kim Gordon* would not have purchased or displayed the Photograph, (Boyajian Decl. Ex. 19 ¶ 7), and Blum & Poe would not have exhibited the Photograph. (UF ¶ 56). Thus, as in *Cariou*, “nothing in the record . . . suggest[s] that [McNatt] would ever develop or license secondary uses of his work in the vein of Prince’s artworks.” *Cariou* 714 F.3d at 709.²⁸

Third, the significant price differential between McNatt’s works and Prince’s works places them in distinct markets. McNatt is often paid \$100 for a license to his images. (UF ¶ 45). *Paper Magazine* paid McNatt between \$50 and \$100 for the photoshoot and use of the Photograph (*id.* ¶ 51),

²⁵ While many fair use cases involve products that are offered for sale on an ongoing basis and the issue is what impact ongoing sales of the secondary products have on the market for the original (*see, e.g., Campbell, Castle Rock, Google Books, HathiTrust*), here, there is no ongoing sale of the *Portrait of Kim Gordon* and no evidence that the painting will re-enter the market. (Supp. DiPersia Decl. ¶ 4).

²⁶ This is not a critical or derogatory assessment; it is simply an acknowledgment that the markets for the [P]hotograph[]...and Prince’s inkjet paintings incorporating th[at] image[]...are entirely different.” (Boyajian Decl. Ex. 58 ¶ 4).

²⁷ The difference between Prince’s market and McNatt’s market is supported not only by the varied consumers of their works, but also the institutions that display their works. While Prince has had solo exhibitions at the Guggenheim and Whitney and has had his work acquired by and exhibited at the world’s preeminent museums (UF ¶ 2) – including a *New Portrait* that was acquired by LACMA just four years after it was made – there is no evidence that McNatt has ever had a solo exhibition at a major museum or had his work acquired by any museum. (*Id.* ¶ 49).

²⁸ The court in *Cariou* made this finding despite the existence of evidence in the record – which does not exist here – that the plaintiff photographer actually lost an exhibition opportunity as a result of the secondary works at issue. *Cariou*, 714 F.3d at 703-04.

and he (illicitly) licensed the Photograph in February 2015 to VOGUE.com for [REDACTED]. (UF ¶¶ 75-82). Documents also reflect that he was paid a [REDACTED] license fee per image by the BBC in 2004, and [REDACTED] for use of a single existing image in a book in 2014. (UF ¶ 46). By contrast, Prince’s work—including his photographs—regularly sells for [REDACTED] (Boyajian Decl. Ex. 50 at 286 [REDACTED] [REDACTED]). In the case of the works at issue here, at the time Prince made the *Portrait of Kim Gordon*, the most McNatt had licensed the Photograph for was \$100, while the *Portrait of Kim Gordon* was offered for sale at [REDACTED]—just like all the *New Portraits* displayed at the Exhibition (which further supports that the market value of the *Portrait of Kim Gordon* is not attributable to the image of the Photograph). (UF ¶¶ 34, 36; Boyajian Decl. Ex. 59 at 280:2-11). The vast difference in the price of the works therefore further underscores the existence of distinct markets for the Photograph and the *Portrait of Kim Gordon*. (Boyajian Decl. Ex. 50 at 213:4-214:21). The market, so to speak, has spoken.

3. McNatt Did Not Lose Any Opportunities to Sell or License the Photograph as A Result of Prince’s Work

Even if McNatt had a right to resell the Photograph (which he does not), it is undisputed that McNatt has not lost any opportunities to sell the Photograph since Prince exhibited the *Portrait of Kim Gordon* in April 2015. This Circuit has ruled that “the possibility, or even the probability or certainty, of *some* loss of sales does not suffice to make the copy an effectively competing substitute that would tilt the weighty fourth factor in favor of the rights holder in the original.” *Google Books*, 804 F.3d at 224 (emphasis added).

Here, McNatt has not shown a possibility—no less probability—of any adverse impact. Indeed, there is no evidence that McNatt has *ever* offered a physical print of the Photograph for sale. (See generally Compl. ¶¶ 16-21). Moreover, VOGUE.com licensed the Photograph after the Prince work was made and posted it on Instagram, and multiple other inquiries for a license to use the

Photograph in its digital form were made by magazines in February 2015, months after Prince created his *Portrait of Kim Gordon* (UF ¶¶ 75-76, 82), and VOGUE.com inquired about using the Photograph a second time in March 2016. (UF ¶ 76; Boyajian Decl. Ex. 45). At his deposition, McNatt even admitted that he is not aware of any opportunities he lost as a result of Prince’s fair use of a portion of an image of the Photograph. (UF ¶ 74). Instead, while not determinative, McNatt has become better known after Prince’s work.²⁹

III. THE ANCILLARY WORKS ARE ALSO NON-INFRINGEMENTS OF THE PHOTOGRAPH

Aside from the creation and display of *Portrait of Kim Gordon*, McNatt’s complaint alleges that Prince is liable for two other acts: (1) Prince’s upload of the image of the Photograph to his personal Instagram account, accompanied by three captions (the “Instagram Post”); and (2) the inclusion of *Portrait of Kim Gordon* in the Gallery Book. Summary judgment should be granted to Prince for each of these ancillary works. Like the *Portrait of Kim Gordon*, the ancillary uses are all quintessential fair uses of the Photograph.

1. Instagram Post

As discussed above in Section B-1, in creating the *Portrait of Kim Gordon*, Prince took a mobile screenshot of an image of the Photograph that he found on Instagram, and posted that screenshot to his own Instagram account, @richardprince4, with the addition of the following commentary: (1) “Portrait of Kim Gordon” (2) “Kool Thang You Make My Heart Sang You Make Everythang Groovy” and (3) music-themed emojis. (UF ¶ 21). To create his physical artwork *Portrait of Kim Gordon*, Prince had the Instagram Post enlarged, inkjetted, and stretched on canvas as a single-

²⁹ While the adverse impact to the *work* at issue – not to the *creator* of the work – is the relevant consideration, *see, e.g., Cariou*, 714 F.3d at 709, the fact that McNatt himself became better known after Prince created the *Portrait of Kim Gordon* (Boyajian Decl. Ex. 58 ¶¶ 8-9; Boyajian Decl. Ex. 4 at 77:21-79:8) could only help his ability to sell his work (including the Photograph) and market himself. Indeed, the district court in *Google Books* came to exactly that conclusion: “a reasonable factfinder could only find that Google Books enhances the sales of books to the benefit of copyright holders [because] [a]n important factor in the success of an individual title is whether it is discovered—whether potential readers learn of its existence. *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282, 293 (S.D.N.Y. 2013), *aff’d*, 804 F.3d 202 (2d Cir. 2015). McNatt capitalized on the enhanced demand for his work generated by Prince’s use. *See* Section D.2, *supra*.

edition work. (UF ¶ 14, 32-33; Prince Decl. ¶ 23).

The Instagram Post is a fair use for many of the same reasons that the *Portrait of Kim Gordon* itself is a fair use, as well as additional reasons. For example, the fourth fair use factor (market impact) further favors Prince because the type of “harm” that McNatt appears to be claiming from this alleged infringement is harm to his moral rights, which are not recognized for works like the Photograph. McNatt testified that he objected to the Instagram Post because he did not receive “credit,” and had it included credit, he would not have had any objection to the post. (Boyajian Decl. Ex. 5 at 51:25-53). Such harm is not protected by the U.S. Copyright Act. *See Kelley v. Chi. Park Dist.*, 635 F.3d 290, 296 (7th Cir. 2011) (in contrast to European law, American copyright law does not protect moral rights; rather, it “protects the economic interests of artists.”). These moral rights, which include rights of attribution and rights of integrity, are only protected in the United States for certain works pursuant to the Visual Artists Rights Act of 1990 (“VARA”), 17 U.S.C. § 106A. *Id.* Commercial works like the Photograph clearly fall outside the purview of VARA (*see* 17 U.S.C. § 106A), which is likely why McNatt chose not to bring a claim under VARA, but instead under 17 U.S.C. §§ 106 and 501, which are focused on economic harm – harm that does not exist in this case.

2. Gallery Book

In September 2016, approximately one year and four months after the Exhibition ended, Blum & Poe released the Gallery Book. (UF ¶ 37). The Gallery Book included images of each of the *New Portraits* works on display at the Exhibition, including the *Portrait of Kim Gordon*. (*Id.* ¶ 38). The Gallery Book was not (and could not have been) intended as an advertisement of the Exhibition or any of the *New Portraits* in the Gallery Book, as all of the *New Portraits* had already been sold months prior. (*Id.* ¶¶ 41-42).

The *Portrait of Kim Gordon* in the Gallery Book was, again, a fair use for many of the same reasons as the *Portrait of Kim Gordon* itself was a fair use, but for additional reasons as well. First,

aside from the fact that the image of *Portrait of Kim Gordon* included in the Gallery Book possesses many of the transformative qualities of the actual painting of the *Portrait of Kim Gordon*, the painting in the context of the Gallery Book was also a fair use because it was part of a historical record of the Exhibition. (UF ¶ 39). See *Bill Graham*, 448 F.3d at 609 (use of copyrighted Grateful Dead posters in book as “historical artifacts to document and represent the actual occurrence of Grateful Dead concert events featured on [a] timeline” was transformative); see also *Bouchat v. Baltimore Ravens Ltd. P’ship*, 737 F.3d 932, 945-47 (4th Cir. 2013), as amended (Jan. 14, 2014) (fair use of copyright sports logo in three stadium displays—a timeline, a highlight reel, and a significant plays exhibit—because the use of the logo in the displays was “designed merely to preserve a specific aspect of Ravens history”). Second, the Gallery Book could not possibly have resulted in any adverse impact on the Photograph, as all of the *New Portraits* were sold one year and four months prior to the date the Gallery Book was made available for purchase. (*Id.* ¶¶ 41-42).

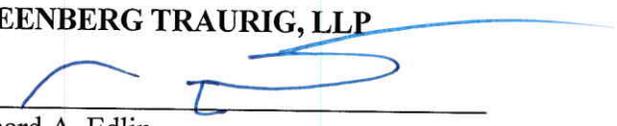
CONCLUSION

Because defendants’ use of the Photograph was a fair use, this Court should grant defendants’ motion for summary judgment.

New York, New York

Dated: October 5, 2018

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