

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REDACTED

UNITED STATES OF AMERICA,

:
: 12 CR 180 (FM)
:

v.

SHEPARD FAIREY,

Defendant.

DEFENDANT SHEPARD FAIREY'S SENTENCING MEMORANDUM

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Shepard Fairey is scheduled to be sentenced by Your Honor on September 7, 2012, following his plea of guilty to one count of misdemeanor contempt, in violation of Title 18, United States Code, Section 402 on February 24, 2012. As the Probation Department recommends, we respectfully submit that a non-custodial sentence would be most appropriate.

PRELIMINARY STATEMENT

Forty-two years old, Shepard is a devoted husband and father of two young daughters, ages four and six. He has worked hard to become a well-known artist and has founded several art studios, despite suffering from Type 1 Diabetes. He owns and runs companies that employ approximately 28 people, and he is the creative force behind a clothing line that employs an additional 80 people. He has donated time, art, and money to charity and has shown genuine acceptance of responsibility for his actions in this case.

The many letters we submit with this memo attest to Shepard's outstanding character. To quote from one: "My trust in Shepard is absolute and unshaken. He is a man of his word and he is incredibly loyal to his employees, friends, fans, and family. . . . When I first talked to Shepard about the matter he expressed his deep regret and . . . took full responsibility for his actions." Exh. 5 (Letter from Kyle Oldorp, friend).¹ From another: "I can count on my two hands the people in my personal and professional network whom I would recommend, under any circumstance, without any hesitation or reservation. Shepard Fairey is one of those people." Exh. 12 (Letter from Yosi Sergant, friend).

Shepard will come before this Court for sentencing in connection with the worst mistake of his life: he destroyed documents and created others during the course of a copyright lawsuit

¹ We have submitted 34 letters and an affidavit in support of Shepard. They are contained in the Appendix and are organized by the writer's relationship with Shepard.

with the Associated Press (the “AP”). He committed these acts not to better his chances of winning the lawsuit or to enrich himself, but out of fear of embarrassment. Shepard has long acknowledged his misconduct and shown extraordinary acceptance of responsibility for it. Shepard confessed before the government’s investigation began and cooperated fully with the investigation conducted by the United States Attorney’s Office. [REDACTED]

[REDACTED] From the outset of the investigation, he made clear to the Office what he had done and he entered a guilty plea upon the filing of the charge. There is no chance that Shepard will suffer a similar error of judgment in the future.

Shepard suffers from Type 1 Diabetes. His disease can cause complications which would threaten his vision, nervous system, and kidneys, and which would require the kind of quick and immediate specialized attention not necessarily available within the Bureau of Prisons. Moreover, although Shepard has pleaded guilty to a Class B Misdemeanor, and although there is no chance of recidivism and he poses no threat to anyone’s safety, his diabetic condition essentially mandates that if he is sentenced to any term of imprisonment he will be ineligible to serve that sentence in a minimum-security institution. Rather, Shepard will almost surely be designated to a low-security prison, a much more difficult environment than the minimum-security institutions in which most white collar and non-violent defendants are incarcerated.

For the reasons that follow, we respectfully submit that the specific circumstances of this offense warrant a non-custodial sentence.

BACKGROUND

A. Summary of the Offense

Shepard pled guilty to disobeying a discovery order issued by Judge Hellerstein in connection with a copyright lawsuit between himself and the AP concerning Shepard's creation of a campaign poster for Barack Obama. In short, after filing his declaratory judgment action, Shepard realized there was an error in the filings and violated the discovery order by destroying and creating documents to support the facts as stated in the complaint.

1. Shepard Created the Hope Poster with a News Photograph He Believed Was a "Crop" of the Clooney Photo In Order To Aid the Obama Campaign

In January 2008, Shepard could not know that Barack Obama would ultimately become the Democratic presidential nominee, let alone win the election, but he supported then-Senator Obama's positions on various issues. See, e.g., Exh. 27 (Letter from Scott Goodstein, member of Obama's 2008 campaign) ("[Shepard] was willing to stand up and announce his support for Obama" before it was popular to do so because "he wanted to do his part to help Obama make this a better world."). To help the Obama campaign, Shepard set out to create an inspirational political portrait and began by searching online for a photograph of Obama. He found a news photograph of Obama and George Clooney in front of the American flag (the "Clooney Photo"), but the image's resolution was too low for Shepard's purposes, so he continued searching. The next day, he found a higher resolution news photo that he believed was a "crop" of the Clooney Photo that showed Obama against the same flag ("Obama Photo"). Shepard used that photograph as the reference for the poster he created to support Mr. Obama's presidential bid, the "Hope Poster." In fact, it turned out that the Obama Photo was a different photograph altogether and *not* a higher-resolution crop of the Clooney Photo. But Shepard did not realize

that at the time, and was not to realize it until after the litigation with the AP began, a regrettably late realization that led to the conduct underlying this case.

2. Contemporaneous Proof That Shepard Believed He Used A Crop of the Clooney Photo

In email and telephonic exchanges that occurred long before the AP threatened to sue Shepard — and therefore before any purported motive to lie existed — Shepard stated his belief that he used a crop of the Clooney Photo as the reference for the Hope Poster. In early 2008, Shepard's friend Glen Friedman, a photographer who had an interest in Shepard's art, asked Shepard which image he used to create the poster. Shepard told Mr. Friedman what he truly believed: that he had referenced the Clooney Photo. Deposition of Glen Friedman, Sept. 17, 2009, at 112:2-114:10; 119:4-120:25.² Later, in July 2008, Mr. Friedman emailed Shepard: "did that Obama HOPE image come from a photo of him next the [sic] George Clooney? I saw it the other day." Shepard responded by telephone and reiterated that he had used the Clooney Photo. See Deposition of Shepard Fairey, Mar. 16, 2010, at 286:13-289:6. Shepard also had a conversation with Sean Bonner in the summer of 2008 — again, before there was any hint of litigation — in which Shepard told Mr. Bonner that he had used the Clooney Photo as a reference. Deposition of Sean Bonner, July 9, 2009, at 70:7-71:5. In November 2008 — still, before any thought of litigation — Mr. Friedman again emailed Shepard, this time attaching the Clooney Photo. In his email response, Shepard indicated that the version he used had Clooney cropped out. Before the litigation began, Shepard had never compared the Clooney Photo and the Obama Photo, which contain nearly identical images of then-Senator Obama and were taken

² This deposition transcript, like all documents referred to in this memorandum but not attached to it, is available upon the Court's request.

moments apart. He never had a reason to review the Clooney Photo — let alone compare it to the Obama Photo — after he decided not to use it.

3. The AP Threatened To Sue Shepard For Copyright Infringement; Shepard Filed His Complaint Against The AP Before He Compared The Two Photos

About a year after Shepard created the Hope Poster, in February 2009, the AP threatened to sue Shepard for copyright infringement. The Stanford Fair Use Project agreed to represent Shepard *pro bono*, in large part because the issue presented by the case “was critical to the development of the law of fair use.” Exh. 31 (Prof. Lawrence Lessig, former director of the Fair Use Project at Center for Internet and Society “Stanford Fair Use Project”). Neither Shepard nor his lawyers believed that he had done anything wrong, because they believed that his use of an AP photo constituted “fair use” under the copyright laws.³ Shepard attempted to settle the matter before litigation, but the AP was unbending. Upon his lawyers’ advice, Shepard decided to seek a declaratory judgment that the Hope Poster did not infringe the AP’s copyrights.

Shepard’s counsel filed the complaint against the AP on February 9, 2009, under time constraints produced by the AP’s threat to file its own lawsuit against Shepard. At that time, Shepard had not yet met the Fair Use Project lawyers in person, corresponding with them only by email and telephone. Shepard had truthfully told Anthony Falzone, the lead Fair Use Project lawyer, that he believed he used the Clooney Photo as a reference. Mr. Falzone never challenged that statement, asked Shepard to confirm the source, or met with Shepard to review the image before filing the complaint. When Shepard reviewed the draft complaint with his lawyers in anticipation of filing, Shepard was in Boston to attend the opening of an exhibition of his

³ Shepard always believed that his use of the photo constituted “fair use,” because he “transformed” the photograph. Shepard never took action to hide that he used an AP photograph; indeed, he publicly stated that he did.

artwork at the prestigious Institute of Contemporary Art (“ICA”). The ICA show was Shepard’s first solo exhibit, and his most important art show to date. On February 6 — right before his ICA show opened and while Shepard was in Boston with his family — Shepard had a conference call with Mr. Falzone to review the draft complaint. Shepard took the call from a couch in a hotel room, while his parents, wife, and young children were present. During the call, Shepard followed the draft complaint on a laptop. This was the only time Shepard reviewed the complaint before it was filed. No images were attached to the draft he reviewed. Nor did Shepard have his own files with him. Exh. 2 (Letter from Strait and Charlotte Fairey, Shepard’s parents). At the time, he was under tremendous “pressure to make many decisions” and was “overwhelmed.” Id.

4. Shepard Realized His Mistake After the Complaint Was Filed

Shortly after the complaint was filed, Shepard saw a blog that compared the Clooney Photo with another AP photograph of Obama in front of the American flag taken at the same event within moments of the Clooney Photo. Only then did Shepard realize that the image he had used to make the poster was not a crop of the Clooney Photo, but a separate AP photo of Obama that captured him in a similar pose as the Clooney Photo at the same event. A few days later, home in Los Angeles, Shepard checked his files and confirmed his fear that his complaint had identified the wrong AP photograph as the reference for the Hope Poster.

Shepard never believed that the strength of the lawsuit’s legal arguments would be impacted by whether he had referenced the Obama Photo or the Clooney Photo. Shepard’s lawyers had told him that the essential focus of the copyright analysis would be whether Shepard had “transformed” a neutral news photograph into a political poster — which he had clearly

done.⁴ The two photographs were nearly identical for the purposes of such an analysis: both AP photographs were taken by the same photographer moments apart at a run-of-the-mill conference and portray Obama in strikingly similar poses. See Exh. 31 (Letter from Prof. Lawrence Lessig, former director of the Stanford Fair Use Project) (“[I]t didn’t matter to the fair use argument which [photo] he had used.”).

But Shepard felt foolish that he — a visual artist — had not distinguished between the two different images and had allowed the complaint to be filed with a mistake in it. Unready to confront the error, he told no one. He did not know that his lawyers could have easily amended the complaint to fix the error. He feared that the AP would use its access to the media to spin his honest mistake to its advantage.

The more time passed, the harder it became to tell Mr. Falzone about the mistake. Shepard believed that his lawyers would be angered and lose trust in him. He also felt trapped by his initial silence. As the days passed, he felt increasingly humiliated both about the initial mistake and his failure to disclose it.

5. Shepard’s Spoliation

Shepard’s lawyers scheduled their first in-person visit with him on March 26, 2009, about six weeks after the civil complaint was filed. Before the visit, in a huge lapse of judgment, Shepard created files in order to make it appear as if he had referenced the Clooney Photo and not the Obama Photo. He then deleted the original electronic documents.⁵ When the lawyers

⁴ The changes Shepard made to the AP photo were so dramatic that although the photographer saw the poster numerous times, he did not realize that it was based on a photograph he had taken until a blogger identified it. Transcript of Interview of Mannie Garcia on NPR Show Fresh Air, Feb. 26, 2009, available at <http://www.npr.org/templates/transcript/transcript.php?storyId=101184444> (“Well, no, to answer the question, no. I didn’t recognize it was my photo.”).

⁵ There is proof that the spoliation occurred after the February complaint was filed. Metadata from Shepard’s

arrived, Shepard showed them the new documents, described his artistic process and told them that he had used the Clooney Photo.

Shepard was ashamed as he was doing these things. He also knew afterwards that he should have corrected his actions. But as time passed he found it more and more difficult to admit what he had done. Shepard spent the following months regretting his decision to alter evidence, lost sleep, became irritable, and for the first time had trouble working. Feeling paralyzed by his original decision, he continued to tell his lawyers and others that he had used the Clooney Photo as his reference, pointed his lawyers to two people who he knew believed (albeit mistakenly) that Shepard had used the Clooney Photo because they had discussed it with him before he realized his mistake,⁶ and allowed an April 14, 2009 filing to repeat that Shepard created the Hope Poster by referencing the Clooney Photo.

On August 8, 2009, Shepard sent a misguided email asking his employees to find the company policy to throw away files that are not being used, or if they could not find the policy (which Shepard believed existed), that they create it.

6. Shepard Confession and Acceptance of Responsibility

The AP was never fooled. Indeed, when Shepard confessed, the AP's lawyer issued a public statement stating that, "We're not surprised.... It was always obvious which photograph he had used, as we said in our counterclaim."⁷ In fact, during the course of the lawsuit, the AP

computer makes clear that Shepard "uploaded" the new files onto his office's computer system at 10:15 a.m. on March 26 — about 45 minutes before Mr. Falzone arrived.

⁶ Both of these individuals — Sean Bonner and Glen Friedman — have written letters on Shepard's behalf in connection with this sentencing. See Exhs. 6 and 7.

⁷ Statement by Dale Cendali, counsel for the AP, in response to the revelation of the spoliation, dated October 19, 2009, available on the Kirkland & Ellis website at: <http://www.kirkland.com/sitecontent.cfm?contentID=230&itemId=9096>.

pressed for documents to disprove Shepard's claim. On October 2, 2009, one of Shepard's employees found copies of the original Hope Poster files pursuant to the Stanford lawyers' request.

Shepard immediately confessed to his lawyers, wife, employees, and friends. This was before depositions, substantive motions, and substantive rulings had been issued.

Shepard's remorse was genuine and severe. Tina Soikkeli, Shepard's assistant since 2006, writes of the conversation she had with Shepard when he told her what he had done:

I know what Shepard did was wrong and so does he. This is the biggest and most regretful thing he has ever done. I know it is, by the way he shared it with me. He asked me to close the office door and broke down when he told me what he had done. I had never seen Shepard like that. He was so embarrassed and ashamed of what he had done. He made a mistake in judgment and I believe he acted out of fear.

Exh. 9. When he called his friend, photographer Glen Friedman, to tell him what he had done, Mr. Friedman "thought someone had died due to the tone of his voice. . . ." Exh. 7. Shepard's parents describe how Shepard "broke down in tears saying 'You did not raise me to be dishonest and I am so ashamed.'" Exh. 2 (Letter from Charlotte and Strait Fairey). Mr. Bonner describes his call with Shepard as "the most heartfelt apology [he had] ever received." Exh. 6 (Letter from Sean Bonner, friend). Professor Lawrence Lessig writes how Shepard came to see him in person in Boston to apologize for his actions. Exh. 31. Professor Lessig states that Shepard "recognized just how profoundly wrong and stupid his behavior had been" and "had no desire to hide from its consequences." *Id.* Carol Rose, a director of a charitable organization, writes how Shepard called her to apologize and "offered to withdraw from the [fundraising] project because he didn't want his mistake and subsequent damage to his reputation to hurt" the organization. Exh. 29.

In an emotional speech to his employees, Shepard explained what he had done, that he felt terrible about his actions, and that he holds himself to a higher standard than his conduct reflected. Exh. 10 (Letter from Olivia Perches, Shepard's business manager). Shepard made calls and wrote emails to many friends and business contacts — people completely unrelated to the copyright lawsuit — about his actions. See, e.g., Email from Shepard Fairey to Jason Filipow, Oct. 20, 2009 (“I only have myself to blame. . . . Needless to say, that was a big mistake and very short-sighted. I'm correcting the record now, but I'm not proud of the circumstances. . . . I'm sorry to let down myself and others who believe in me and the fair use cause.”).

Shepard also began the repair process in the civil suit. He sent a letter to the AP, through his lawyers, informing it of what had happened. On October 16, Shepard notified the court in a motion to amend the pleadings. Shepard issued a press release admitting his misconduct and taking full responsibility. Statement by Shepard Fairey on Associated Press Fair Use Case, Oct. 16, 2009 (“In an attempt to conceal my mistake I submitted false images and deleted other images.”).⁸ He also was willing to make the AP whole for its costs in connection with his misconduct.⁹

Shepard has never wavered from his decision to accept full responsibility. He agreed to be deposed for five days and answered all questions the AP put to him regarding his misconduct, even though he knew that there was a pending criminal investigation and Judge Hellerstein, who presided over the copyright litigation, had made clear that he would consider harsh sanctions.

See Transcript of Hearing at 12:8-12, *Fairey v. Associated Press*, 09-CV-1123 (Nov. 10, 2009)

⁸ Available at http://obeygiant.com/images/2009/10/LA1-28598-v2-Shepard_Fairey_Statement_Re_AP_Matter_10-16-09.pdf.

⁹ In December 2010, Shepard made an unconditional offer to pay the AP's attorneys' fees relating to the spoliation. The AP did not accept this initial offer. We understand the AP did not want a third party to review its bills to determine the extent of those losses.

(“Nov. 10, 2009 Tr.”).

As soon as the government issued its subpoenas, Shepard authorized his lawyer to communicate to the AUSA that he “did it” and make clear his desire to cooperate, provide any documents requested, and answer all questions. Shepard even waived attorney-client privilege with respect to the civil case, so the government could review Shepard’s correspondence with the lawyers and his lawyers’ internal emails. Shepard submitted to a proffer with the government, and he provided his tax records so the government could review them.

Shepard remains extremely remorseful. His friend Kyle Oldoerp reports in his letter that he has “been present on more than 50 occasions where Shepard talked about this case” and he never heard “him downplay the situation or make excuses. Every explanation he gave whether it was in public or private was sincere and honest.” Exh. 5 (Letter from Kyle Oldoerp).

7. Shepard Made the AP Whole for Its Harm And Has Suffered Public Derision

Shepard’s actions so damaged his credibility as a witness that in January 2011, even though he and his lawyers believed in the merits of his case, he settled his case with the AP on

[REDACTED]

[REDACTED] The AP stipulated that it would not seek further civil or criminal penalty against Shepard. *Id.* at ¶ 5. Judge Hellerstein — who knew about Shepard’s spoliation — approved the settlement and *sua sponte*

[REDACTED]

dismissed the case.

especially given that Shepard did not have any profit motive for creating the poster.

Shepard's actions also have had great professional and personal consequences for him. In addition to the significant stress any person under investigation might endure, he has been pilloried in the press and blogs.¹¹ When he publicly confessed, he suffered public derision.¹²

B. Shepard's Personal History

1. Childhood and Family

Shepard was born in 1970 in Charleston, South Carolina. He was raised by his parents, Strait and Charlotte Fairey, in a religious household. His father is a family physician, and his mother is a realtor. His parents write that he "loved to draw from the time he could hold a crayon" and that he was passionate about art "before he was 6 years old." Exh. 2.

Shepard's parents taught him the importance of giving back to the community, and he has spent his much of his life involved in charity work. When he was a teenager, he "asked to leave the elite private school he was attending and to attend public school instead where there was a diversity of socio-economic and racial students." Id. (Letter from Strait and Charlotte Fairey).

¹¹ See, e.g., Shepard Fairey Tuesday: Somebody's a Big Liar, The World's Best Ever (Oct. 20, 2009), <http://www.theworldsbestever.com/2009/10/20/shepard-fairey-tuesday-somebodys-a-big-liar/>; Shepard Fairey Is a Liar, TigerHawk (Oct. 17, 2009), <http://tigerhawk.blogspot.com/2009/10/shepard-fairey-is-liar.html>; Edmund Mullins, The Week in Plagiarism: Shepard Fairey & Shakespeare, BlackBook (Oct. 20, 2009), <http://www.blackbookmag.com/art/the-week-in-plagiarism-shepard-fairey-shakespeare-1.32480>.

¹² See e.g., Fairey Admits He's a Lying Liar, Universal HUB (Oct. 17, 2009), <http://www.universalhub.com/node/28341#comment-104815>; Dennis Romero, Shepard Fairey Pleads Guilty to Conspiracy After He Manufactured Evidence in 'Hope' Civil Court Battle with Associated Press, LA Weekly (Feb. 24, 2012), http://blogs.laweekly.com/informer/2012/02/shepard_fairey_guilty_hope_poster_lie.php; Brian Sherwin, Making a Mockery of Fair Use and Creative Freedom: Artist Shepard Fairey Pleads Guilty to Criminal Contempt over Fake Evidence, Fine Art Views, Feb. 25, 2012, <http://faso.com/fineartviews/40657/making-a-mockery-of-fair-use-and-creative-freedom-artist-shepard-fairey-pleads-guilty-to-criminal-contempt-over-fake-evidence>.

Shepard went on to the Rhode Island School of Design (“RISD”) and in 1992 earned a Bachelor of Fine Arts.

While attending RISD, Shepard did artwork and screen printing for a company called Max Formal Company. The owner, Paul Formal, is still in touch with Shepard and writes that he and his wife “love him as if he were our own son.” Exh. 14 (Letter from Paul Formal) (calling Shepard a “once in a lifetime special and beautiful person.”). Mr. Formal praises Shepard for his “brilliance, integrity, honesty and work ethic.” Id. Mr. Formal helped Shepard start his first graphic art business while he was still a student at RISD.

Shepard and his wife, Amanda, have been married for ten years and have [REDACTED] daughters, [REDACTED]. They are a close family; Shepard is a “devoted husband and father.” Exh. 2 (Letter from Strait and Charlotte Fairey). Amanda writes in her letter to the Court that:

Shepard is an integral part of our family’s life. It would be a tremendous hardship emotionally if he were to leave our family due to imprisonment or any other reason. We have dinner as a family and share many hours reading stories, helping with schoolwork, and playing with our girls. He is very close with our daughters. They love him very much.

Exh. 1 (“It breaks my heart to imagine having to tell [our daughters] that their father will not come home for six months.”). Shepard’s sister-in-law states that his daughters “light up when they see their father. They love showing him their latest artistic creations and singing rock and roll songs while dancing in their bedroom with their dad.” Exh. 3.

Andrew McKenna Lee, a good friend, writes that “I can say from firsthand experience that Shepard is a proud and affectionate father to his two young girls a loving husband to his wife....” Exh. 4. Tina Soikkeli, who works closely with Shepard and Amanda, writes that

Shepard is “a great father to his two beautiful daughters.” Exh. 9. Shepard’s friend Jennifer Howell writes that Shepard “loves Amanda so selflessly, he lives for [REDACTED] and he takes time out from whatever is going on in his life to be there for his friends.” Exh. 23. Family friend Kyle Oldoerp echoes this: “[Shepard] is a remarkable father to his young daughters [REDACTED] The absence of their father would be devastating to them and their development.” Exh. 5.

As Amanda writes, “[no] one has been harder on Shepard than he has been on himself. I think the thing that has pained him most has been the stress his actions in this matter has created for our family.” Exh. 1.

2. Shepard Suffers From Type 1 Diabetes

When he was 16-years old, Shepard was diagnosed with Type I Diabetes Mellitus, a medical condition that requires him to wear an insulin pump, test his blood sugar multiple times daily, take specific medication, adhere to a strict diet, replace his insulin about every other day, and exercise regularly in order to maintain an appropriate blood sugar level. Shepard also suffers from high blood pressure and cholesterol, and has shown signs of “significant kidney disease.” See Exh. 33 (Letter from Dr. Wanski, Shepard’s treating physician).

When Shepard was diagnosed with diabetes, his pancreas was not producing any insulin. Exh. 33 (Letter from Dr. Wanski). To regulate his insulin levels, Shepard has worn an insulin infusion pump since 2004. The insulin pump provides Shepard with a continuous dosage of insulin throughout the day. Id. Dr. Wanski has observed that the insulin pump has significantly improved Shepard’s blood sugar levels. But it is not uncommon for Shepard’s insulin tube to clog. When that happens, Shepard needs to be able to change it quickly. Exh. 1 (Letter from

Amanda Fairey). Dr. Wanski worries that if Shepard were to be incarcerated, it may be difficult to find a specialist who has the proper knowledge and understanding of the insulin pump, which could lead to a deviation in Shepard's insulin management schedule and cause Shepard's condition to worsen. Exh. 33.

Due to his illness, Shepard also has experienced severe vision problems requiring multiple, complex surgeries. As detailed in the letter of Dr. Dean Elliott, several years ago Shepard developed a dense vitreous hemorrhage (bleeding in the eye) and retinal detachment in both eyes. Exh. 32 (Letter from Dr. Elliott, Shepard's ophthalmologist). He lost some vision temporarily. To repair the damage, Shepard underwent vitrectomy surgery, a "complex procedure that involves removal of the blood from the vitreous cavity, microscopic dissection of the scar tissue that develops on the surface of the retina, and re-attachment of the retina using laser and an intraocular gas bubble." Id. Shepard had an exceptional outcome, due in large part to constant "clinic visits," post-operative treatments, and the control of his blood glucose. Id.

Subsequent to his surgeries, Shepard developed diabetic macular edema (swelling of the retina). The condition was successfully treated with a focal laser treatment; however, Shepard must continue to monitor his diet, exercise regularly, and undergo "frequent postoperative examinations." Id.

Although Shepard suffers from a serious eye condition, he has had an excellent outcome to date because of the rigorous level of medical care he has received, including regular eye examinations and access to sub-specialty and emergency care, and due to his carefully-monitored diet and exercise regimen. Id. Should Shepard suffer another vitreous hemorrhage, he would need immediate, expert medical attention in order avoid severe vision loss or blindness. Id.

As Dr. Elliott observes, it is not apparent that the appropriate medical care exists in the prison system. He has witnessed bad outcomes for diabetic inmates due to their need for immediate treatment when a complication arises. *Id.* Shepard has gotten sick each time that he spent a night in jail for putting up art in public without permission because the jail staff did not provide him with his insulin in a timely fashion.¹³

3. Shepard's Career

After graduating from RISD, Shepard started his own art business, borrowing \$6,000 from his parents to do so. Exh. 2 (Letter from Strait and Charlotte Fairey). He struggled financially for the next six years, sometimes barely having enough money for food. *Id.*

In 1997, Shepard was the subject of a documentary screened at the Sundance Film Festival and concerning his "Obey Giant" work. By 2004, Shepard was considered one of the most important contemporary artists of his generation, and his work was selected for exhibition at Cincinnati's prestigious Contemporary Arts Center, where he was chosen to moderate one of the show's panels. By 2006, Shepard had created enough art to fill a 347-page published retrospective. By 2007, Shepard's art had been displayed in museums across the United States and in Europe.

In 2007, before Shepard began work on the Hope Poster, Boston's Institute of Contemporary Art ("ICA") contacted Shepard to plan his first solo exhibition. The ICA show opened in February 2009, days before the civil lawsuit at the heart of this matter was filed. One reviewer said that "Fairey, who's still only 38, could turn out to be as central to his era as Warhol

¹³ In a video he created to help other people with diabetes, available at <http://www.dlife.com/dlifetv/video/shepard-fairey>, Shepard explained that "I actually have gotten very sick from being in jail a day or two without insulin. One time in New York, I actually thought that I might perish in jail. It was a very scary situation."

was to his.”¹⁴ The Director of the Museum of Contemporary Art in Los Angeles has written that Shepard is “one of the most admired and most influential artists of his generation” and “one of our greatest American artists.” Exh. 18 (Letter from Jeffrey Deitch).

Despite Shepard’s success and the fact that he has founded several art studios and graphic design businesses, he does not live a “lavish” lifestyle. See Exh. 2 (Letter from Strait and Charlotte Fairey). Rather, he has remained “incredibly modest,” Exh. 28 (Letter from Ken Brecher, President of the Library Foundation of Los Angeles), and humble. Exh. 6 (Letter from Sean Bonner, friend and husband of gallery owner) (describing how Shepard offered to sleep on a couch to reduce costs for the gallery showing his work).

Shepard currently employs about 28 people across three companies — Studio Number One (a graphic design agency), Obey Giant Art, Inc. (a fine art company), and Obey Giant LLC (a company which licenses his images for a clothing line). His presence is critical for the work of his companies — Obey Giant Art exclusively produces his art, and he is the creative director for Studio Number One.¹⁵ His employees appreciate that Shepard “takes his employees’ ideas, concerns, and thoughts into consideration” when making decisions. Exh. 3 (Letter from Maria Faruolo, Shepard’s sister-in-law and Human Resources Manager). Tina Soikkeli, Shepard’s assistant, calls Shepard “the best boss I have ever had.” Exh. 9. Olivia Perches writes that working with Shepard is a “joy and privilege.” Exh. 10.

¹⁴ Bill Van Sieten, Shepard Fairey Blurs Line Between Fine and Commercial Art, Providence J. Bull., Feb. 5, 2009, available at 2009 WLNR 2294460.

¹⁵ He is also critical to the clothing line that licenses his art for its graphics. See Exh. 16B (Letter from Don Juncal to probation).

4. Shepard's Extraordinary Charitable Giving

By any measure, Shepard's charitable donations of art, money, and time have been extraordinary. As Justin McCormack, Shepard's business partner for one project, writes, "I have been in the entertainment business for 25 years, and I have never before seen someone so talented who gives back to society on the scale that Shepard does." Exh. 11. In fact, Shepard donates about 25 percent of his time to charity every year. Shepard's business manager, Olivia Perches, writes that as his business manager she "sometimes had great difficulty with the fact that such a large percentage of [his] organization's efforts [a]re spent on these expensive, time-consuming projects that would not yield a financial return." Exh. 10 ("Shepard is always willing to open his heart and wallet, lend a hand or offer an artwork or an ear to a person or cause in need.").

Shepard typically becomes deeply involved with the organizations that he helps. The organizations he has worked with include the Natural Resources Defense Council, Arctic National Wildlife Refuge, various cancer research organizations, the Human Rights Action Center, The U.S. Campaign for Burma, and Human Rights Watch. Shepard has acted as an advocate for others with diabetes. An episode of a series called "*dLife*" designed to provide information to and remove stigma from people with diabetes featuring Shepard aired on July 29, 2012. See Exh. 24 (Letter from John P. McCally). Other examples are included in the letters submitted to the Court on Shepard's behalf.

Shepard often contributes to charities by creating original art for them consistent with the organizations' missions. He also attends events, speaks to other donors, gets other people involved, and donates money. As Jeffrey Deitch, the Director of the Museum of Contemporary

Art in Los Angeles states, Shepard is “remarkably generous in working on public art works and educational projects with children. He regularly donated works of art to charitable causes.” Exh. 18; see also Exh. 16A (Letter from Don Juncal, President of the company that sells Shepard’s clothing line) (“Shepard’s charitable work is prolific.... He is generous in donating his art, time, money, as well as his voice for many causes.”); Exh. 25 (Letter from Meegan Lee Ochs, special events director of ACLU of Southern California) (Shepard “showed great care in crafting his presentation... as well as tremendous appreciation for and understanding of the ACLU’s work... rare and deeply appreciated qualities in our program participants.”); Exh. 20 (Letter from Kirsten Connor, director of CityKids) (stating that Shepard helped raised \$250,000 for the group, resulting in “a dramatic turnaround for [the organization.]”).

Shepard’s generosity also extends to his family, friends, and colleagues. He has aided a colleague with a drug dependence problem, raised money for a child with a brain tumor, spent time with a friend’s elderly mother, and has sent packages to strangers who were struggling financially. Exhs. 5, 8, 13, and 14 (Letters from Kyle Oldoerp, Gregory Macias, Cleon Peterson, and Paul Formal). He also worked with the Keep A Breast Foundation, which raises money for breast cancer treatments and prevention, to create a series of artworks, prints, and murals for their campaign called the “Non Toxic Revolution,” in a tribute to his mother, who battled breast cancer.¹⁶

The Hope Poster itself was a charitable endeavor from which Shepard never intended to profit. As Olivia Perches, Shepard’s business manager, writes, “Shepard instructed myself and the other employees that all monies generated from sales associated with the Hope Image should

¹⁶ The posters can be viewed at <http://obeygiant.com/headlines/non-toxic-revolution-print-series>.

be rolled into producing more posters or stickers, given to the Obama campaign, or donated to charity.” Exh. 10; see also Exh. 1 (Letter from Amanda Fairey) (stating that “Shepard said he wanted to create the poster to help a political cause, not to further his career”). One person involved with the project writes of several occasions “when opportunities to monetize the ‘HOPE’ image arose that Shepard refused.” Exh. 12 (Letter from Yosi Sergeant).

Shepard has created a program called Obey/Awareness that sells apparel to support and raise awareness about specific organizations, and then donates the proceeds from sales of that apparel to the organizations. As Obey Clothing-owner Don Juncal explains in his letter to the Probation Department, these projects have raised over \$750,000 for a host of charitable organizations. Exh. 16B.

Shepard not only creates art for charity, but also gives generously to various causes. In 2009, he donated \$134,246 in cash to charitable organizations. In 2010, he donated \$72,824. In 2011, he donated \$98,017. He continues with his charitable work to this day.

5. Shepard’s Prior Arrests

Shepard’s philosophy of art emphasizes that art should not be shown only in museums, but also in everyday spaces. Earlier in his career, in order to get art into public spaces, Shepard sometimes placed his art in public without permission. He was arrested on several occasions for doing so. But when Shepard placed his art in public without authorization, he took care to do so in inoffensive locations (for example, on the boards of abandoned buildings that would later be removed) and in inoffensive ways (for example, Shepard does not use spray paint in his public works because it does not wash off).

With his success, Shepard no longer needs to place art in the public space without

authorization — cities invite him to create works of art in their public spaces. In the last year, he has created murals in Paris, London, Copenhagen, Dallas, Cincinnati, Los Angeles, New York, and San Diego. Shepard recently created a mural in his adopted hometown, West Hollywood, and, as Mayor Duran attests, the City “could not be any happier” with the murals. Exh. 21.

DISCUSSION

We respectfully request that the Court impose a non-custodial sentence. Because the Sentencing Guidelines do not apply to the Class B misdemeanor at issue, the Court need only look to Section 3553(a),¹⁷ which requires that the Court impose a sentence “sufficient, but not greater than necessary” to comply with the purposes set forth in that section. United States v. Puckett, No. 10-CR-06-2 (RWS), 2010 WL 4006834, at *1 (S.D.N.Y. Oct. 12, 2010) (internal quotation marks omitted). A non-custodial sentence is most appropriate and would best serve the interests of justice.

A. Shepard’s “History and Characteristics” Support A Non-Custodial Sentence

As the many letters appended hereto attest, Shepard’s misconduct was an anomaly in his life. See e.g., Exh. 10 (Letter from Olivia Perches) (“It was entirely out of character for him.”); Exh. 12 (Letter from Yosi Sergant) (“... it was, in my opinion, an anomaly”).

Friends describe him as “one of the most honest people that I know,” Exh. 5 (Letter from

¹⁷ These factors are: “(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed— (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for— (A) the applicable category of offense committed by the applicable category of defendant as set forth in the [Sentencing Guidelines] . . . ; (5) any pertinent policy statement [in the Sentencing Guidelines]; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.” 18 U.S.C. § 3553(a).

Kyle Oldoerp), “a man of outstanding attributes, a short list of which includes his talent, benevolence, honesty, sense of fairness, intelligence, humanity, generosity, humor, and altruism,” Exh. 10 (Letter from Olivia Perches), “the hardest worker I ever met,” Exh. 14 (Letter from Paul Formal), “charitable,” Exh. 3 (Letter from Maria Faruolo), “constantly giving,” Exh. 9 (Letter from Tina Soikkeli), “genuine, sincere,” Exh. 8 (Letter from Gregory Macias), “unfailingly warm, humble, and gracious,” Exh. 19 (Letter from Mary Brosnahan, director of Coalition for the Homeless), “someone who trie[s] to do the right thing,” Exh. 6 (Letter from Sean Bonner), “honest[] and forthright[],” Exh. 11 (Letter from Justin McCormack), “a wonderful role model,” Exh. 23 (Letter from Jennifer Howell, founder of a children’s organization), someone who has “inspire[d]” people through “hard work,” Exh. 15 (Letter from John Jay, partner of a creative agency).

Even the two men the Information labeled Witness-1 and Witness-2, appreciate that his conduct was aberrant and completely forgive him. See E.g., United States v. Rowe, No. 10-CR-607, 2011 WL 6019010, at *2 (E.D.N.Y. Nov. 29, 2011) (sentencing defendant to time served and probation after finding that the crime was “out-of-character” for the defendant). The photographer Glen Friedman, with whom Shepard had discussed the poster before the litigation began, states, “This was so out of character for the man I had come to know over the last decade it was barely believable. I assured him our friendship was not damaged in the slightest. . . .” Exh. 7. Sean Bonner, for his part, writes, “I told him that I was disappointed, but of course would forgive him.” Exh. 6.

1. Shepard’s Extraordinary Charitable Giving

Courts regularly consider a defendant’s good moral character in sentencing. Time and

again, courts have credited defendants for their commitments to community service, which demonstrates the defendant's moral character. See, e.g., United States v. Shy, 538 F.3d 933, 938 (8th Cir. 2008) (finding defendant's post-offense, pre-indictment rehabilitation, including position as contributing member of society through her "extraordinary work with persons with disabilities" justified probation for narcotics crime where guidelines range was 37–46 months); United States v. Maese, 146 F. App'x 276, 276, 281 (10th Cir. 2005) (affirming district court's decision to depart downwards from guidelines range of 21–27 months to an 8-day sentence based in part on the defendant's "exceptional record of community service"); United States v. Gayle, No. 09-CR-35S, 2010 WL 2540488, at *2 (E.D.N.Y. June 17, 2010) (sentencing defendant under § 3553(a) to five-years probation where defendant's guidelines range was 37–46 months, due in part to her "remarkable history of community service"); United States v. Czark, No. 06-CR-170, 2008 WL 4862457, at *1 (E.D.N.Y. Sept. 8, 2008) (sentencing defendant under § 3553(a) to five-years probation, where guidelines range was 87–108 months, in part in recognition of his 35 hours a week of charity work for the Red Cross and Habitat for Humanity); United States v. Greene, 249 F. Supp. 2d 262, 265 (S.D.N.Y. 2003) (holding that defendant's "truly extraordinary" record of charitable works contributed to a sentence of probation without incarceration).

Shepard's commitment to community service, discussed at length above, and in the letters submitted on his behalf, is extraordinary. See Exh. 12 (Letter from Yosi Sergant) ("He has participated in thousands of community organization events, educational opportunities, charity fundraising opportunities, and professional training series and has been a personal and professional mentor to so many."). Suffice it to say that not only has Shepard donated much

time, money, and art, his donations have had extraordinary impact. For example, Mary Brosnahan, the director of The Coalition for the Homeless, the country's oldest organization helping homeless men, writes that Shepard has had a "tremendous impact" on efforts to end homelessness and is an "invaluable partner." Exh. 19. Kirsten Connor, the Executive Director of The CityKids Foundation, wrote described how Shepard's efforts "saved the organization." Exh. 20.

2. Shepard's Extraordinary Acceptance of Responsibility

Shepard has taken exemplary actions to repair the mistake that he made: he immediately worked to repair the record, waiving any conflict to allow his lawyers to quickly and fully describe his conduct and provide the documents at issue; he apologized publicly and fully for the error in a press release; he called a company-wide meeting to apologize to his staff; he had personal one-on-one conversations to apologize to the people he was closest to; he wrote emails to scores of friends and work contacts to explain and apologize for what he did; he answered questions about his conduct during five days of depositions, waiving his Fifth Amendment right against self-incrimination; and he settled with the AP, [REDACTED] [REDACTED] Letter after letter in the Appendix attest to the fact that Shepard's remorse was genuine.

Shepard immediately cooperated with the government's investigation and at the outset authorized his lawyers to tell the government that he would not deny the conduct. He appeared for a proffer, answered every question put to him, provided documents, waived attorney-client privilege, and produced his tax returns at the government's request. He entered a guilty plea in front of Your Honor on February 24, 2012. It is significant that Shepard cooperated with the

government's investigation, even though he knew he could not receive a 5K letter given that he was the only person responsible for the conduct. Cf. United States v. Fernandez, 443 F.3d 19, 33 (2d Cir. 2006) ("We agree that in formulating a reasonable sentence a sentencing judge . . . should take under advisement . . . the contention that a defendant made efforts to cooperate, even if those efforts did not yield a Government motion for a downward departure pursuant to U.S.S.G. § 5K1.1"); United States v. Ochoa-Ramos, No. 07-CR-102, 2008 WL 2062341, at *3 (E.D. Wis. May 13, 2008) (considering defendant's cooperation with the government as evidence of defendant's positive character and acceptance of responsibility under Section 3553(a), beyond the acceptance of responsibility reduction under Section 3E1.1 and despite the absence of a 5K motion from the prosecution).

Shepard's acceptance of responsibility — admitting his misconduct before he was under criminal investigation, [REDACTED], and more — is a testament to his character. We respectfully ask that the Court consider these acts in fashioning an appropriate sentence. E.g., United States v. McGee, 802 F. Supp. 843, 844 (E.D.N.Y. 1992) (pre-Booker) (departing downwards to a non-custodial sentence in a heroin importation case in part because "defendant's contrition [wa]s exceptional," and because the defendant did "everything she could to accept responsibility for her crime and to cooperate with the government").

B. The Nature and Circumstances of the Offense Support a Non-Custodial Sentence

The facts of this case support a non-custodial sentence.

At the threshold, Shepard did not make the Hope Poster — or commit spoliation — for personal profit. He created the poster to support the Obama campaign and brought the

declaratory judgment action with the assistance of *pro bono* lawyers in order to protect an artistic principle that he cared about — to clarify the “fair use” rights of artists to reference and transform other visual works. Well before the AP had threatened to sue, Shepard instructed his employees to donate profits from the posters. Exh. 10 (Letter from Olivia Perches). See United States v. Rothberg, 222 F. Supp. 2d 1009 (N.D. Ill. 2002) (downward departure proper where defendant, in copyright infringement case, did not act out of a desire to profit or benefit financially).

Nor did Shepard commit spoliation to improve his position in the civil case. He did not believe that the fair use issues would turn on which photograph he referenced because the photographs were nearly identical, and both were property of the AP. His copyright lawyers had informed him that the central issue was whether his poster had “transformed” the image and the analysis was essentially the same for both photographs. See Exh. 30 (Letter from Shepard’s replacement counsel in the copyright case) (“Mr. Fairey, a prominent artist who had been involved in copyright disputes in the past, was well aware of the judicial interpretation of ‘fair use,’ and it is completely implausible that he could have believed misidentification of the source image for the Hope poster would have given him any advantage in the litigation.”).

Shepard only realized after his complaint was filed that he had used the Obama Photo as the reference image, not the Clooney Photo. He then made a horrible decision out of fear of public humiliation. See Exh. 9 (Letter from Tina Soikkeli) (“I believe he acted out of fear”); Exh. 31 (Letter from Prof. Lawrence Lessig) (stating that Shepard had explained to him that his actions were “incredibly stupid” and “reflected ego more than judgment”); Exh. 2 (Letter from Shepard’s parents) (“He had no motivation of greed, but had been placed in a vice by

multiple powerful forces. Fear is a powerful motivator and panic precipitated decisions that are out of character.”).

In addition, Shepard’s offense never deceived the AP, which knew all along which photo served as the poster’s reference. The offense did not cause the Court to issue any incorrect substantive rulings. Nor did Shepard “dig in deeper” after the spoliation was discovered and commit perjury at his deposition. Rather, he self-corrected what he could, the altered evidence was recovered, and he made full restitution to the AP.

C. The Seriousness of the Offense Does Not Warrant A Term of Imprisonment

Shepard has pleaded guilty to a Class B Misdemeanor. The sentencing guidelines do not apply to Class B misdemeanors. See U.S.S.G. § 1B1.9. Shepard recognizes that what he did was wrong. Given the mitigating factors described above, we ask that the Court sentence Shepard to a non-custodial sentence.

D. A Non-Custodial Sentence Is a Just Punishment For This Offense

Section 3553(a)(2)(A) directs the Court to ensure that the punishment for the offense is just. The civil system has already resulted in significant punishment to Shepard. The fallout from Shepard’s spoliation so weakened his litigation position that what began as a strong case for a declaratory judgment of fair use ended with Shepard agreeing to settle on onerous terms. Exh. 30 (Letter from Shepard’s replacement counsel in the copyright case) (“Mr. Fairey of course ultimately agreed to a settlement, despite his and our belief that his legal position was correct. An important factor in this decision was that the existence of the criminal investigation limited our ability to litigate on a level playing field against a sophisticated, deep-pocketed and aggressive opponent.”). In fact, the AP is not asking for any additional punishment. Exh. A

(Settlement Agreement) (the AP “will not seek any further civil or criminal action or penalty against” Shepard). Nor did Judge Hellerstein – who made clear that he would not let Shepard “get away from” his misconduct, Nov. 10, 2009 Tr. at 12:9 – sanction Shepard after learning of the settlement.

Shepard also suffered significant damage to his reputation as a result of his spoliation. Shepard has been called everything from an “idiot” to a “lying liar.” An Internet search of Shepard’s name now produces results not just about his artistic and civic accomplishments, but also many websites degrading him for his misconduct. Not every defendant suffers this level of public shaming, which due to the Internet, will now be a permanent scarlet letter for Shepard to wear. See United States v. Freedman, No. 02-CR-441 (LAP) (S.D.N.Y. June 14, 2005) Sentencing Tr. at 64, (sentencing defendant who had guidelines range of 108-135 months’ imprisonment after being convicted on twelve counts of bank fraud, to three years’ probation due in part to the public humiliation that the defendant already had suffered as a result of the public nature of the prosecution).¹⁸

To the extent additional punishment is warranted, a term of probation can accomplish that goal. Probation can include travel restrictions, reporting requirements, and real consequences in the case of failure to adhere to its terms or future misconduct. Any future misconduct can be dealt with through a probation revocation hearing, which carries much easier burdens and procedures for the government. Under the circumstances of this case, this is a more appropriate form of punishment than imprisonment. See United States v. Knights, 534 U.S. 112, 119 (2001)

¹⁸ The sentence was originally vacated and remanded by United States v. Cutler, 520 F.3d 136 (2d Cir. 2008) but the Second Circuit receded from Cutler in United States v. Cavera, 550 F.3d 180 (2d Cir. 2008) (en banc), and Freedman was resentenced in 2009 to the original sentence with credit for his completion of the original sentence. Sentencing Transcript, United States v. Freedman, No. 02-CR-441 (LAP) (S.D.N.Y. Oct. 14, 2009).

(“Probation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty. . . . Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled.”) (internal citations and quotations omitted).

E. A Term of Imprisonment Is Not Needed To Ensure Adequate Deterrence

A term of imprisonment is not needed to ensure general deterrence of civil litigation misconduct.

Shepard’s pre-investigation public admissions of his misconduct, combined with the press coverage essentially making clear that Shepard’s spoliation “cost” him the case, have already accomplished much in the way of general deterrence. See Liz Robbins, *Artist Admits Using Other Photo for ‘Hope’ Poster*, THE NEW YORK TIMES (Oct. 17, 2009) (“Mr. Fairey’s admission, which he made public on Friday, threw his legal battle with the news agency into disarray”).¹⁹

The government’s decision to then charge Shepard, and his immediate guilty plea, also accomplished general deterrence goals. The government issued a 13-page Information and a press release that successfully publicized the event.²⁰ See Benjamin Weiser, *Shepard Fairey Pleads Guilty Over Obama ‘Hope’ Image*, THE NEW YORK TIMES (Feb. 24, 2012).²¹ This kind of attention to civil litigation misconduct is rare, because prosecutions in this area are rare.²² It is

¹⁹ Available at <http://www.nytimes.com/2009/10/18/arts/design/18fairey.html>.

²⁰ Press release dated Feb. 24, 2012, issued by the United States Attorney’s Office for the Southern District of New York, Artist Shepard Fairey Pleads Guilty in Manhattan Federal Court to Contempt Charge in Connection with Civil Litigation Over Obama “Hope” Image.

²¹ Available at <http://artsbeat.blogs.nytimes.com/2012/02/24/shepard-fairey-pleads-guilty-over-obama-hope-image/>.

²² M. Koesel & T. Turnbull, Spoliation of Evidence 117 (2d ed. 2006). Even when spoliation occurs, courts rarely refer the matter for prosecution. See Lundwall, 1 F. Supp. 2d at 254 (cautioning prosecutors to think twice before bringing spoliation cases, even for the “most flagrant” violations); Victor Stanley, 269 F.R.D. at 539 (referral of spoliation to the United States Attorney’s Office is “unusual and extreme for spoliation cases”).

the existence of this rare prosecution that has and will serve as the “wake-up call” the government no doubt intends to send, not the sentence.

After Shepard confessed his actions in 2009 and before the government began its investigation, his civil lawyers advised him that while a prosecution against him was possible, it was “unlikely.” Letter from Joseph Gratz of Durie Tangri, co-counsel to the Stanford Fair Use Project, to Shepard Fairey, dated Oct. 4, 2009. It is now unlikely that such advice will be given in the future, because the government has used this case to send its general deterrence message in powerful form.

Moreover, the fact that Shepard confessed before the investigation began and then repaired the record is not only significant to assessing his offense, but also to deterrence concerns. Shepard detailed what he had done and worked to repair the record before depositions and before any substantive motions had been filed. He confessed before the government was investigating. If, despite these actions, Shepard is punished with jail time, future spoliators — perhaps those motivated by more venal considerations than those present for Shepard — may be less likely to come clean. This would mean that spoliation in other cases — done by more typical spoliators — would never come to light, and instead be driven deeper underground.

F. There is No Need to Protect the Public From Future Crimes by Shepard

Shepard is an upstanding citizen, artist, business owner, husband, and father. The government has informed us that it agrees that there is no likelihood that Shepard will ever do something like this again. Shepard’s acceptance of responsibility, displays of genuine remorse, [REDACTED], among other things, attest to this. Indeed, in settling the civil case, [REDACTED]

[REDACTED]

G. A Non-Custodial Sentence Will Allow Shepard to Continue Treatment for his Diabetes

Sentencing Shepard to a non-custodial sentence will allow him to continue his current treatment for his diabetes without alteration. His diabetes would make any prison sentence a much greater punishment.

As detailed above, Shepard suffers from “severe diabetic retinopathy,” which if not properly treated, could lead to severe vision loss or blindness, and has led to multiple eye surgeries. The chance of Shepard suffering a complication if incarcerated is high; when Shepard was previously arrested for putting up posters without permission, he suffered a diabetic episode every time he spent the night in jail. Shepard’s severe form of diabetes warrants special consideration at sentencing. See United States v. Burks, No. 08-CR-332, 2010 WL 1221752, at *2 (E.D.N.Y. Mar. 29, 2010) (sentencing defendant convicted of defrauding financial institutions over \$5 million to a non-guidelines sentence of one month imprisonment under 18 U.S.C. § 3553(a) where the guidelines range was 57 to 71 months in part because of the defendant’s “long-standing diabetes, which is degenerative and will lead to further problems with his eyes”); see also United States v. Harris, 567 F.3d 846, 854-55 (7th Cir.) (remanding for resentencing where district court imposed 504-month sentence without mentioning defendant's argument that complications from diabetes, including amputated leg, warranted lower sentence), cert. denied, 130 S. Ct. 1032 (2009); United States v. White, 506 F.3d 635, 640-41 (8th Cir. 2007) (affirming downward variance based in part on defendant’s diabetes); Sentencing Transcript at 64, United States v. Freedman, No. 02-CR-441 (LAP) (S.D.N.Y. June 14, 2005) (sentencing defendant

convicted of participating in a \$100 million fraud to three years' probation due in part to the fact that "adequate medical care for this defendant cannot be accomplished in prison").

Shepard's doctors have indicated that it is imperative that he have access to immediate medical care if he experiences any complications. See Exh. 32 (Letter from Dr. Elliott) ("His eye condition continues to be extremely serious and the prognosis is guarded. Should Mr. Fairey suffer another severe vitreous hemorrhage or retinal detachment, he would require immediate, expert medical attention or else he could suffer serious loss of vision or blindness."); Exh. 33 (Letter from Dr. Wanski) ("[A]ny change in diet may lead to significant deterioration of sugar control, which could result in loss of consciousness. If that occurred, he would need immediate medical attention"). Both doctors expressed concern about whether the care Shepard needs would be available to him in prison. Exh. 32 (Letter from Dr. Elliott) ("I have witnessed occasional bad outcomes for diabetic patients who have been incarcerated."); Exh. 33 (Letter from Dr. Wanski) ("many endocrinologists do not prescribe insulin infusion pumps, so it may be difficult to find a specialist who could properly treat Shepard, if he were incarcerated.") ("immediate medical attention... may be hard to achieve in the prison setting."). Joel A. Sickler, an expert on the Bureau of Prisons,²³ avers that Shepard's access to medical specialists would be limited in prison both because the special care Shepard needs is highly limited there and because the prisons' administrative policies require multiple levels of review. Exh. 34 (Affidavit of Joel A. Sickler ("Sickler Aff."), Aug. 29, 2012, ¶ 7, 22) ("[A]ccess to specialists is limited by an administrative policy that requires multiple levels of review. If Mr. Fairey is sentenced to a term

²³ Joel A. Sickler is the founder of the Justice Advocacy Group, a consortium of criminal justice professionals; he has 30 years' experience advising attorneys, courts, probation officials and clients in area of federal sentencing and federal prison related matters.

of incarceration, he is likely to wait weeks (potentially the entirety of the sentence) before being seen by a specialist.”) In the event Shepard experienced a medical emergency, Shepard would have to wait for permission to be transported to an emergency room. Id. at ¶ 8. Mr. Sickler, who has years of experience dealing with prison-related issues, states that “[l]iving with a serious medical situation in a prison environment — an impersonal, bureaucratic, often unsanitary, and sometimes ineptly run environment — exacerbates serious medical conditions.” Id. at ¶ 6.

Moreover, should the Court sentence Shepard to a term of imprisonment, Shepard’s incarceration will be much harsher than it would be if he did not have diabetes. If Shepard did not suffer from his form of diabetes, he would be eligible for placement in a minimum-security camp, given his personal history and the non-violent nature of the offense. Id. at ¶ 4. However, Mr. Sickler learned from the BOP’s Medical Designations office that inmates who require insulin pumps (like Shepard) are initially designated to Medical Care Level 3 facilities.

Mr. Sickler indicates that though the BOP lists two camps as having Medical Care Level 3 facilities, in practice the BOP Medical Designations office will only send inmates that require Medical Care Level 3 facilities to the camp in Terre Haute, Indiana. Id. at ¶ 15. However, the camp at Terra Haute Indiana does not accept diabetic patients. Id. As a result, Shepard will be placed in a Medical Care Level 3 low-security prison rather than a camp, making any term of incarceration harsher for him than it would be for another person in his position simply because of his medical condition.²⁴ This fact merits consideration by the court in determining an

²⁴ The degree of security at low-security prison will be much harsher than at a minimum-security camp. Exh. 34 at ¶ 5. In general, those institutions houses inmates serving sentences greater than 10 years or who pose a public safety threat or are escape risks.²⁴ Id. at ¶ 19(d). Many low-security inmates have violent histories; some have organized crime connections or are street gang affiliated. Id. At the low-security prisons, as opposed to a minimum-security camp, Shepard would be subjected to much harsher security conditions, including random pat downs, periodic assembly strip searches where officers inspect the inmate’s bodies for bruises (to determine if they have been

appropriate sentence. Cf. United States v. Lara, 905 F.2d 599, 603 (2d Cir. 1990) (agreeing with district court that the defendant’s “fragility” warranted consideration in sentencing because the “severity of [the defendant’s] prison term [would be] exacerbated” because his time in prison would be harsher solely due to his physical condition).

We respectfully ask that the Court consider these facts in fashioning an appropriate sentence. Under the circumstances, if the Court feels that it is necessary to sentence Shepard to a custodial term — which we ask the Court not do — we request that the Court order the sentence to be served as a term of home confinement. See United States v. Rhodes, 288 F. Supp. 2d 928, 937 (C.D. Ill. 2003) (sentencing defendant to term of home confinement based, in part, on her “seriously infirm physical condition”).

H. A Sentence of Imprisonment Would Cause An Unwarranted Disparity

1. Most People are Not Charged with This Crime at All

A criminal prosecution for spoliation is “extraordinary.” Margaret M. Koesel & Tracey L. Turnbull, Spoliation of Evidence: Sanctions and Remedies for Destruction of Evidence in Civil Litigation 117 (2d ed. 2006). The civil system already has mechanisms (sanctions and civil contempt) that deal with misconduct. Sentencing Shepard to a custodial sentence will create a disparity between his treatment and the treatment of most people who spoliates documents during civil litigation.

We have found sparse evidence of defendants being charged with crimes for spoliating in the context of a civil case. We have found *no* cases in which a party to a civil litigation who

involved in an altercation), and “lockdowns” where inmates are confined to their quarters for extended periods of time following security incidents, such as a fight involving more than two inmates, or to allow for contraband searches. Id. at ¶ 19(a).

altered evidence was prosecuted, and only one in which a non-party was charged, United States v. Lundwall, 1 F. Supp. 2d 249 (S.D.N.Y. 1998). Lundwall resulted in an acquittal. See Beryl A. Howell, The Slippery Slope From Spoliation to Obstruction, N.Y.L.J., July 27, 2006 at n.15.²⁵ In Lundwall, the government charged that individuals who were not parties to the litigation had improperly withheld and then destroyed documents. In upholding the indictment against a dismissal motion, the court found that the prosecution was justified due to the “unusual circumstance[]” that “civil remedies [were] inadequate” because the defendants were not parties to the civil litigation and thus their actions were not “remediable through civil sanctions.” Id. at 255. These “unusual circumstances” are not present here. Shepard was a party to the civil litigation and subject to the full array of civil remedies.

In contrast, there are several cases in which spoliation is known to have occurred in the context of a civil case, with no resulting criminal prosecution. In many of these cases, the circumstances were much more egregious than was the case here — involving greater harm, worse spoliation, repeated alterations and misrepresentations, failures to take responsibility, and the consumption of significant court time.

In Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 515 (D. Md. 2010), the court described the spoliation as “the single most egregious example of spoliation” that it had ever encountered or read about. The harm done to the civil litigation was sweeping, with a laundry list of aggravating factors (none of which is present here): (1) it took years for the misconduct to come to light; (2) the altered evidence was not recovered; (3) the accused lied

²⁵ Available at <http://www.strozfriedberg.com/files/Publication/557c30a6-1bc1-41ac-a419-1c3f646b642d/Presentation/PublicationAttachment/550b877a-06a7-4a41-8c29-1e48ef168e4a/HowellObstructionDataDestruction.pdf>.

when questioned under oath about what he had done; (4) the misconduct involved thousands of deletions; (5) the wrongdoer disregarded direct court orders to protect relevant information; (6) the wrongdoer had previously spoliated in another civil case; and (7) the misconduct required *hundreds* of hours of the court’s time to resolve. But even in Victor Stanley, the court declined to refer the case to the U.S. Attorney’s Office for criminal prosecution, in part because the court determined that the civil system was adequate to deal with the conduct. Id. at 501 n.5.²⁶

2. [REDACTED]

²⁶ There are other examples of spoliators who withheld evidence, much more significant than that at issue here, and who settled the case before the civil system had an opportunity to correct the matter. Those spoliators likewise were not prosecuted. See e.g., Living Designs, Inc. v. E.I. DuPont de Nemours & Co., 431 F.3d 353 (9th Cir. 2005); In re E.I. DuPont de Nemours & Co.-Benlate Litig., 99 F.3d 363 (11th Cir. 1996). Likewise, the spoliation that occurred in Krumwiede v. Brighton Assocs., LLC, No. 05 Civ. 3003, 2006 WL 1308629 (N.D. Ill. May 8, 2006), was much worse than that here, and there is no evidence of a criminal investigation, let alone prosecution. In the context of an employment dispute, the plaintiff spoliated documents on a computer belonging to his prior employer, lied to the court by saying that he had not received the court’s order requiring him to turn over certain items, falsely denied spoliating, and altered and deleted files directly relevant to his employer’s counterclaims in a clear attempt to affect the merits of the lawsuit. Despite the existence of several aggravating factors not present here — including a direct lie to the court — we could find no evidence that he was prosecuted. Rather, the court granted a default judgment to the employer and fees to compensate it for the costs of its sanctions motion.

²⁷ Shepard Fairey et al. v. The Associated Press and Mannie Garcia, 09-CV-1123, Letter from Dale M. Cendali to Hon. Alvin K. Hellerstein, May 14, 2010 at 6-7 (“Particularly troubling is the fact that by the time Garcia produced the altered documents to The AP in December 2009, all of the parties to the case as well as the Court were already well aware that Mr. Fairey had admitted to spoliation and fabrication in this case and that The AP intended to seek sanctions against Mr. Fairey as a result.”).

[REDACTED]

[REDACTED]

I. [REDACTED]

We respectfully ask that the Court decline to order restitution in this matter.

Shepard “offered from the beginning to indemnify the AP for losses that he caused them.” Exh. 30 (Letter from Shepard’s replacement counsel in the copyright case). [REDACTED]

[REDACTED]

[REDACTED].²⁸ As such, restitution is unnecessary in this case. See United States v. Nucci, 364 F.3d 419, 423 (2d Cir. 2004) (holding that the Mandatory Victims Restitution Act does not entitle a victim to recovery “in excess of the amount of the loss”); see also United States v. Boccagna, 450 F.3d 107, 119 (2d Cir. 2006) (“[R]estitution attempts to compensate for loss by restoring the victim to a position he occupied before the

²⁸ [REDACTED]

injurious event.” (internal quotations and alterations omitted)); United States v. Coriaty, 300 F.3d 244, 253 (2d Cir. 2002) (recognizing “the statutory focus on the victim’s loss and upon making victims whole”).

[REDACTED]

J. The Court Should Decline to Impose a Fine

We respectfully request that the Court adopt the Probation Department’s recommendation and decline to impose a fine on Shepard. Under 18 U.S.C. § 402, a fine can be paid “to the United States or to the complainant or other party injured by the act constituting the contempt.” Section 402 states that “in no case shall the fine to be paid to the United States exceed ... \$1,000.” Id.

If the Court sentenced Shepard to pay a fine over \$1,000 pursuant to 18 U.S.C. § 3571(b)(6) or (d), the fine would be “apportioned” and the amount exceeding \$1,000 would be paid to the “party injured by the act constituting the contempt” — the AP. See 18 U.S.C. § 402.

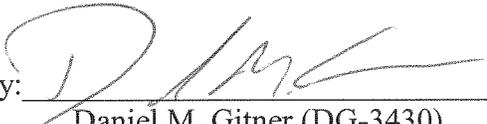
But the AP [REDACTED]

[REDACTED] does not seek further sanction. See Exh. A at 7 (Settlement Agreement) [REDACTED]

CONCLUSION

For the foregoing reasons, we respectfully request that the Court adopt the Probation Department’s recommendation and impose a non-custodial sentence.

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