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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT

FRANK LOPERA, an individual,

Plaintiff,

vs.

TERRY RICHARDSON, an individual; TASCHEN AMERICA LLC, a Limited Liability Company; TASCHEN LOS ANGELES, LLC, a Limited Liability Company, and DOES 1 through 20, inclusive,

Defendants.

Case No. BC 342964

[Assigned for all purposes to the The Honorable Rolf M. Treu]

DEFENDANT TERRY RICHARDSON'S NOTICE OF SPECIAL MOTION AND SPECIAL MOTION ("SLAPP') TO STRIKE PLAINTIFF'S COMPLAINT PURSUANT TO C.C.P. SECTION 425.16; MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATIONS OF TERRY RICHARDSON, ALEX WIEDERIN, SCOTT HAGENDORF AND MICHAEL E. WEINSTEN IN SUPPORT THEREOF

Date: February 15, 2006
Time: 8:30 a.m.
Department: 58

Peremptory Challenge to Judicial Officer Pending Per CCP 170.6

Complaint Filed: November 14, 2005

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 15, 2006, at 8:30 a.m. or as soon thereafter as the matter may be heard, in Department 58 of the Superior Court (or in such other Department to which the matter may hereafter be assigned), at 111 N. Hill Street, in Los Angeles, California,

defendant Terry Richardson will move, and hereby does move, for an order striking and dismissing with prejudice the entire Complaint of plaintiff Frank Lopera pursuant to Section 425.16 of the California Code of Civil Procedure, and directing Mr. Lopera to pay attorneys' fees and costs as prescribed by Section 425.16(c) of the California Code of Civil Procedure.

This Motion is based on the grounds that the Complaint impinges on the defendant's right of free speech under the United States and California Constitutions in connection with a public issue, and that the plaintiff cannot demonstrate a probability of prevailing on any cause of action in the Complaint.

This Motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities and Declarations of Michael E. Weinsten, Terry Richardson, Alex Wiederin and Scott Hagendorf, the pleadings and records on file in this action, and upon whatever other oral and or documentary evidence and argument may be presented to the Superior Court at or before the hearing of this Motion.

Dated: January 18, 2006

LINER YANKELEVITZ
SUNSHINE & REGENSTREIF LLP

By: _____
Michael L. Novicoff, Esq.
Attorneys for Defendant
TERRY RICHARDSON

TABLE OF CONTENTS

TABLE OF AUTHORITIES (cont.)

Page(s)

FEDERAL CASES

CA STATE CASES

NY STATE CASES

TABLE OF AUTHORITIES (cont.)

Page(s)

STATE STATUTES

INDEX OF EXHIBITS

Exhibit No.	Description
1.	Contact sheets LTI printed from negatives developed for Mr. Richardson (redacted).
2.	Lab log for job number 322590.
3.	Contact sheet LTI printed from negatives developed for Mr. Richardson (redacted).
4.	Lab log for job number 330912.
5.	Release signed by Mr. Lopera.
6.	Cease and Desist letter dated August 26, 2003 from Daniel Crupain to Terry Richardson and Edizione Charta.
7.	Letter dated September 5, 2003 from Eric R. Johnson to Daniel Crupain.
8.	Letter dated September 24, 2003 Eric J. Johnson to Daniel Crupain.
9.	Article dated October 1, 2005 from Photo District News titled "The 25 most influential living photographers."
10.	Article from New York magazine entitled "Sure Shot."
11.	Article from LA Weekly magazine titled "It's Terry's World and You're Just Afraid of It."
12.	Press Release from Deitch Projects regarding the opening of Deitch Projects.
13.	Pages from *XXX: The Power Of Sex In Contemporary Design* (Rockport 2003).
14.	People Search Report on plaintiff Frank Lopera provided by intelius.com.
15.	Person Summary Report on plaintiff Frank Lopera obtained from Lexis/Nexis.
16.	Article regarding *Terryworld* from website Mondopopsickle.com.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This action concerns four photographs taken in 1997 and 1998 and recently published in "*Terryworld*," a collection of the work of acclaimed artist Terry Richardson. The plaintiff, Frank Lopera, modeled for these four photographs and, now that the work has become famous around the world, is suing the artist and his publisher for invasion of privacy. Mr. Lopera denies signing any release, and so he hopes to use the threat of expensive discovery and protracted litigation to force an extortionate settlement.

The truth, however, is that Mr. Lopera ***did*** sign a release and thus has no realistic chance of prevailing on the merits of this action. Fortunately, California's anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16, not only permits but requires the Superior Court to examine the evidentiary merits of this action before requiring a response from the artist-defendant. Because the plaintiff cannot meet his burden of showing a probability of success on the merits, this Special Motion to Strike must be granted.

II.

FACTUAL BACKGROUND

A. The Works of Defendant Terry Richardson

Defendant Terry Richardson is a world-renowned artist and one of the most prolific and controversial photographers of this day. A recent survey by Photo District News lists him among the "25 most influential living photographers." Weinsten Decl. ¶ 2, Exh. 9. He has been described as "a fashion power player" (*New York Magazine*), "a modern Helmut Newton" (art director for *French Vogue*), "one of the most sought-after image-makers in fashion and pop culture" (*LA Weekly*), the "God of Truth," and "the irreverent New Yorker who changed photography forever" (Deitch Gallery). Weinsten Decl. ¶ 3, Exhs 10-12.

Although Mr. Richardson's photographs -- especially those with overtly sexual themes -- may at times shock the viewer, he is venerated by his peers and by the academic and critical communities as an artist whose work depicts and comments upon life in its truest form, with

blemishes intact. His work has been the subject of numerous books and has been exhibited in prominent galleries throughout North America, Europe and Asia. Richardson Decl. ¶¶ 3-4. Mr. Richardson has also been featured in scholarly works pertaining to the fashion photography and design industries, including *XXX: The Power Of Sex In Contemporary Design* (Rockport 2003). Richardson Decl. ¶ 3 ; Weinsten Decl. ¶ 6, Exh. 13. Mr. Richardson's photographs have been published in top magazines throughout the world, including *Vogue*, *French Vogue*, *British Vogue*, *Japanese Vogue*, *I-D*, *Dazed and Confused*, *GQ*, *Harper's Bazaar*, *W*, and *Purple*. Richardson Decl. ¶ 4. His models have included, among others, Daniel Day Lewis, Faye Dunaway, Leonardo DiCaprio, Vincent Gallo, Sharon Stone, Mickey Rourke, Jay Z, 50 Cent, Mena Suvari, Nicolas Cage, Dennis Hopper, Catherine Deneuve, the Spice Girls, Samuel L. Jackson, McCauley Caulkin, Viggo Mortenson, Joaquin Phoenix and Juliet Lewis — a number of whom appear in *Terryworld*, the 2004 collection of Mr. Richardson's most personal and provocative art that is at the center of this dispute. Richardson Decl. ¶ 2. A copy of that work is being lodged along with this motion.

B. The Allegations Of The Complaint

Plaintiff Frank Lopera is a model who began his career in or around 1996. See Complaint, ¶ 7. His suit involves four photographs of him taken by Mr. Richardson and reprinted in *Terryworld*. See Complaint ¶ 14 (and exhibits to Complaint); *Terryworld* lodged with the Court. Mr. Lopera claims that these four pictures are being used without his consent because, according to him, (a) the pictures were taken during a "test" shoot in 1995 or 1996, when he was seventeen years of age (Complaint ¶¶ 7 and 12); (b) he was not told that the "test" would involve posing nude or that the pictures would be publicly displayed (Complaint ¶¶ 7-9); and (c) neither he nor anyone acting on his behalf ever signed a release for these pictures (Complaint ¶ 12). These are the plaintiff's key charging allegations:

> [A]t no time before, during or after the 'test shoot' was Mr. Lopera asked to execute a written release for the use of his photograph, image and/or likeness in any format. At no time before during or after the 'test' shoot was Mr. Lopera's legal guardian asked to execute a written release for the use of his photograph image or likeness in any format.

Complaint, ¶ 12.

These allegations are provably false, and the evidence to that effect accompanies this Special Motion to Strike. See, e.g., Release attached as Exhibit 5 to the accompanying Declaration of Terry Richardson. Because the artistic works in question are protected by California's anti-SLAPP statute, Cal. Civ. Proc. Code 425.16, this action must be dismissed at this stage unless the Superior Court, after an examination of the evidence, finds "a probability that the plaintiff will prevail" on his claim. As the following evidentiary showing demonstrates, that is simply not possible, and so this Special Motion must be granted.

C. The True Facts

Although the Complaint does misstate the dates on which the four photographs at issue were actually taken, there is no dispute that the plaintiff was born on April 28, 1978 and turned eighteen on April 28, 1996.[1]

Furthermore, it can easily be established that the four photographs at issue here were actually taken in three shoots between 1997 and 1998, when Mr. Lopera was nineteen and twenty years old. Moreover, Mr. Lopera **did** sign a release authorizing the use and publication of the artwork in which he appeared, and so there is no possibility – much less a probability – that he could prevail on the merits if this case was allowed to proceed.

1. The Photographs At Issue Were Taken In 1997 and 1998

Mr. Richardson first met Mr. Lopera during a fashion shoot in or around January 1997. Over the course of several years, Mr. Richardson shot at least four jobs using Mr. Lopera, none of which involved nudity. Richardson Decl. ¶ 6.

The first time that Mr. Richardson photographed Mr. Lopera in the nude was in November of 1997, in New York City. Richardson Decl. ¶ 7; Hagendorf Decl. ¶¶ 2-3, Exhs. 1-2. As demonstrated by the contact sheets and associated lab reports from the company which developed the film, LTI Labs, two of the photographs at issue in this case were taken at this November 1997

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[1] If necessary, the Superior Court can take judicial notice of this date from the public birth records. Weinsten Decl. ¶ 7, Exhs. 14-15. However, the plaintiff's date of birth is not actually in dispute at all, and indeed the Complaint admits that Mr. Lopera was seventeen during some point in both 1995 and 1996, see Complaint, ¶ 7, which means he must have been born at some point during the year 1978.

shoot. Compare the Exhibits to the Complaint (2nd and 4th photo of plaintiff) with Hagendorf Decl. ¶¶ 2-3, Exhs. 1-2. It is Mr. Richardson's practice not to shoot models under the age of 18 and, in this case, he expressly confirmed with Mr. Lopera that he was nineteen at the time of this shoot. Richardson Decl. ¶ 8.

The next time that Mr. Richardson shot nude photos of Mr. Lopera was in June 1998 in Los Angeles. Richardson Decl. ¶ 9; Hagendorf Decl. ¶ 4-5, Exhs. 3 & 4. The contact sheets and LTI lab reports for this shoot demonstrate unequivocally that this last nude photograph was taken at the June 1998 shoot. Compare the Exhibits to Complaint (3rd photo of plaintiff) with Hagendorf Decl. ¶¶ 4-5, Exhs. 3 & 4.

The fourth photograph, depicting Mr. Lopera fully clothed, was taken in 1998 on a shoot for *Spin Magazine*. It was taken in Los Angeles just prior to the June 1998 shoot. Richardson Decl. ¶ 10.

2. Contrary to the Allegations of His Complaint, the Plaintiff Signed A Release Authorizing the Use of His Image In Mr. Richardson's Art.

Shortly after the June 1998 shoot, Mr. Richardson contacted Mr. Lopera and asked that he sign a release for ***all*** of the photographs he had taken of Mr. Lopera. Richardson Decl. ¶ 11, Exh. 5. Mr. Richardson explained to Mr. Lopera that the photographs were to be used in art shows and in books of his art. Id. Mr. Lopera agreed without hesitation and, on June 18, 1998, he met with Mr. Richardson on the set of a shoot for Mondi to sign the release. Id. The release was executed in front of Alex Wiederin (the art director for the Mondi shoot) who expressly recalls Mr. Richardson telling Mr. Lopera he needed a release of "***all***" Lopera photographs for the show and books. Wiederin Decl. ¶ 2. The release is broadly worded and states in pertinent part:

> . . . I hereby give the photographer, his legal representatives and assigns, those for whom the photographer is acting, and those acting with his permission, or his employees, the right and permission to copyright and/or use, reuse and/or publish, and republish ***photographic pictures or portraits of me***, or in which I may be distorted in character, or form, in conjunction with my own or a fictitious name, on reproductions thereof in color, or black and white ***made through any media by the photographer at his studio or elsewhere, for any purpose whatsoever***; including the use of any printed matter in conjunction therewith.

Richardson Decl. ¶ 11, Exh. 5. (emphasis added).

On its face, the release is not limited to any particular photograph but rather encompasses *all* photographs taken of Mr. Lopera by Mr. Richardson. As explained below, Mr. Lopera's conduct following execution of the release further confirms the fact that all of the photographs taken during 1997 and 1998 photos were covered. In addition, of course, the plaintiff has no real credibility at all, since his pleading denies that this release even exists.

After the Release was signed, Mr. Wiederin and Mr. Richardson offered Mr. Lopera a job on the Mondi shoot, for which he was paid. Richardson Decl. ¶ 11; Wierdin Decl. ¶ 3.

3. The Artwork Featuring Mr. Lopera Was Published In 1998 With Mr. Lopera's Consent

Artwork from the 1997 shoot with Mr. Lopera (including two of the photographs at issue in this case) was first published in September 1998, with the release of *Hysteric Glamour*, Mr. Richardson's first book. Richardson Decl. ¶ 13. The works were also displayed in an art show timed to correspond with the release of the book. Id. Mr. Lopera attended the art show and was shown a copy of the book. Id. For five years he gave no indication at all that he was concerned about the use of his photographs. Indeed, over this period of time, Mr. Lopera continued to work with Mr. Richardson and used Mr. Richardson's notoriety to try to further his modeling and acting career. Id.

4. Mr. Lopera and His Attorneys Received a Copy of His Release in 2003 and Again Accede To The Publication Of The Photographs

The first time that Mr. Lopera complained of art containing his image was in August 2003, five years after the photographs at issue were taken. Around August 26, 2003, Mr. Richardson received a cease and desist letter from a New York lawyer representing Mr. Lopera. Richardson Decl. ¶ 14, Exh. 6. The letter came without warning, and addressed Richardson's use of several Lopera photographs (from the 1997 shoot) in the publication of a book entitled, "*The Fourth Sex, Adolescent Extremes*." The letter alleged that "[a]t no time did [Mr. Lopera], or anyone on his behalf, grant permission, in writing or otherwise, for you to use these photographs." Id. In response to the letter, Mr. Richardson's New York counsel forwarded a copy of the release with the expectation that the matter would be dropped. Richardson Decl. ¶ 14, Exh. 7. In a subsequent

conversation, confirmed in a letter from Richardson's attorney, Mr. Lopera's counsel admitted the release was valid and that Lopera was born in April 1978 (and was therefore nineteen and twenty when the photographs were taken). Richardson Decl. ¶ 15, Exh. 8. The matter was dropped. Id.

D. *"Terryworld,"* The Exhibition And Book

Terryworld was released by Taschen in October 2004. Richardson Decl. ¶ 16. In connection with the release, the Deitch Gallery of Soho sponsored a show called *Terryworld* which exhibited works from the book. The event was described as follows:

> On September 10th, 2004 today's greatest photographer is going to show the world why he deserves the notorious moniker "God of Truth." Terry Richardson, the irreverent New Yorker who changed photography forever, will be showing his most personal work in years at Deitch Projects.
>
> For those select few not familiar with Richardson's work it is inimitable combination of low and high art. It is harsh and scary, lewd and erotic, hilarious and beautiful but, most importantly it is loved and understood by everyone who sees it. New York street kids are taught to understand the monolithic beauty of a Japanese landscape while the Parisian intelligentsia are taught the intricate workings of getting high in Hollywood at seven in the morning. How can the most exclusionary European snobs understand the grit of American's alleys? For the same reason the worst junkies alive can wrap their minds around Terry's sensual portraits of celebrities. His photographs are the truth. There is no pretension, no premeditation and no agenda. . . .
>
> Every person who sees this show will be forever altered because the "God of Truth" has surpassed himself and taken his relentlessly venerated genius to a new height of ecstasy. This is more than a tasteful art show about the beauty we all take for granted. It is the documentation of a miracle.

Weinsten Decl. ¶ 5, Exh. 12.

LA Weekly also covered the opening of *Terryworld*:

> These days it's good to be New York's favorite rail-thin, well inked photo sniper [Terry Richardson]. Terryworld (Taschen) and the limited-edition Kibosh (Damiani) were both recently released in conjunction with a savagely attended opening at the Zeitgeist-central Deitch Projects in Soho, during which thousands of rabid downtown kids gleefully braved a human stampede and near inhumane temperatures for a glimpse of Mr. Richardson's latest photographic foray into a land where the photographer's own penis acts as a kind of sword/torch guiding him through the sometimes troubling and oftentimes hilarious wilderness of his unrepentant sexual psyche.

Weinsten Decl. ¶ 4, Exh. 11.

Terryworld has also become the focus of much public interest on the internet. One commentary, on the pop-culture website Mondoposickle.com, describes Mr. Richardson and *Terryworld* as follows:

> Richardson may be considered the bad boy of fashion photography, but to many of us, he is simply a hero. His photos reflect the work of an artist, whose art speaks of the experience of his life, (and these days there is far too much posturing and pretension,) but with Terry Richardson you get the real deal. . .
> Terryworld is not just a sexy coffee table book designed to push the envelope, it's a big beautiful book that validates the art within by its own class and design. . .
> Terryworld is as important a book today as Henry Miller's work was in its own day. We need adult material that challenges us and makes us laugh, cry and think. We need to question life and continue to evolve as a free thinking society.

Weinsten Decl. ¶ 8, Exh. 16.

In the first six months of the release of *Terryworld,* Mr. Richardson's web site, TerryRichardson.com, received hundreds of thousands of "hits" (i.e., visitors). Richardson Decl. ¶ 16. The book has sold thousands of copies, although Mr. Richardson himself will never make a dime from it. Instead, Mr. Richardson allowed his work to be published for a flat fee of $25,000, and this lawsuit alone will cost more than that to defend, even if this motion is granted. Richardson Decl. ¶ 16.

E. <u>This Lawsuit</u>

Having previously failed to shake money out of Mr. Richardson from the launch of "*The Fourth Sex, Adolescent Extremes*," with "*Terryworld*" Mr. Lopera has apparently found a new opportunity, and new lawyers, to try for a second bite at the apple. As explained below, the anti-SLAPP statute was expressly designed to weed out these types of meritless shakedown lawsuits. Mr. Lopera, and his current lawyers, have been put on notice that Mr. Lopera signed a release, and the filing of a complaint that says otherwise is nothing short of malicious prosecution.

III.

<u>LEGAL ARGUMENT</u>

A. <u>California's Anti-SLAPP Statute Applies To This Complaint</u>

California Code of Civil Procedure Section 425.16 was enacted "to eliminate meritless litigation at an early stage in the proceedings." <u>Macias v. Hartwell</u>, 55 Cal. App. 4th 669, 672 (1997). Under that statute:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Cal. Code Civ. P. § 425.16(b)(1).

The phrase "act in furtherance of a person's right of petition or free speech" includes but is not limited to any "conduct in furtherance of the exercise of . . . the constitutional right of free speech in connection with a public issue or an issue of public interest." Cal. Code Civ. Proc. § 425.16(e); Averill v. Superior Court, 42 Cal. App. 4th 1170, 1175 (1996) ("the categories enumerated there [in § 425.16(e)] are not all-inclusive."). "[T]he legislature intended the statute to have broad application." Averill, 42 Cal. App. 4th at 1176; Cal. Code Civ. P. § 425.16(a) (". . . this section shall be construed broadly.")

Our Supreme Court has held that the statute "creat[es] a two step process for determining whether an action" can survive a SLAPP challenge. Navellier v. Sletten, 29 Cal. 4th 82, 88 (2002). In step one, the court decides whether the defendant has made a threshold showing that the challenged claims arise from constitutionally protected activity. Id. "The critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of defendant's right of petition or free speech. The moving defendant has no obligation to demonstrate that the plaintiff's subjective intent was to chill the exercise of constitutional speech or partition rights, or that the act had the effect of chilling such rights." Ingels v. Westwood One, 129 Cal. App. 4th 1050, 1062 (2005).

In step two, the burden then shifts to the plaintiff to demonstrate the evidentiary probability of prevailing on the claim. Navellier, 29 Cal. 4th at p. 88 (citing Equilon Enterprises v. Consumer Cause, Inc., 29 Cal. 4th 53, 67 (2002).

Here, there is no question that the plaintiff's claims arise from a protected activity – the production of art. Accordingly, the plaintiff has the burden to show the likelihood of prevailing on the merits, and this of course is a burden that he cannot meet, especially in the face of the release bearing his signature. The anti-SLAPP statute ensures that the plaintiff cannot use the prospect of

expensive discovery to extort a settlement, and that this action must instead be dismissed for want of a threshold evidentiary showing of probable success.

B. The Complaint Arises From The Defendants' Constitutionally-Protected Activity

This case concerns the publication of works of art, which the courts have consistently recognized as the exercise of free speech. For example, in Comedy III Prods. v. Gary Saderup, 25 Cal. 4th 387, 398-399 (Cal. 2001), the California Supreme Court considered whether or not a lithograph created of the Three Stooges, used to make silk-screened T-Shirts, was entitled to First Amendment protection. On this issue the Court stated:

> ***Nor does the fact that expression takes a form of nonverbal, visual representation remove it from the ambit of First Amendment protection.*** In Bery v. City of New York (2d Cir. 1996) 97 F.3d 689, the court overturned an ordinance requiring visual artists—painters, printers, ***photographers***, sculptors, etc.—to obtain licenses to sell their work in public places, but exempted the vendors of books, newspapers, or other written matter. As the court stated: 'Both the [district] court and the City demonstrate an unduly restricted view of the First Amendment and of visual art itself. Such myopic vision not only overlooks case law central to First Amendment jurisprudence but fundamentally misperceives the essence of visual communication and artistic expression. ***Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection.*** . . . One cannot look at Winslow Homer's paintings on the Civil War without seeing, in his depictions of the boredom and hardship of the individual soldier, expressions of anti-war sentiments, the idea that war is not heroic.' Id. at p. 695.

Comedy III Prods. v. Gary Saderup, 25 Cal. 4th 387, 398-399 (Cal. 2001) (emphasis added).

The United States Supreme Court has also made clear that a work of art is protected by the First Amendment even if it conveys no discernable message: "[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' [citation omitted] would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 569, 115 S. Ct. 2338, 2345 (1995). See also McCollum v. CBS., Inc., 202 Cal. App. 3d 989, 999 (2001), holding expressly that "First Amendment guaranties of freedom of speech and expression extend to all artistic and literary expression, whether in music, concerts, plays, pictures or books. . . The rights protected are not only those of the artist to give free rein to his creative expression, but also those of the listener to receive that expression." See also Dora v. Frontline Video, Inc., 15 Cal. App. 4th

536 (1993), holding that photographs of a plaintiff used in surfing video without his authorization were still entitled to First Amendment protection.

Moreover, the fact that a work of art is done for financial gain does not cause it to lose first amendment protection. "The First Amendment is not limited to those who publish without charge. . . . [An expressive activity] does not lose its constitutional protection because it is undertaken for profit." Comedy III Productions, Inc., 25 Cal. 4th at 396 (quoting Guglielmi v. Spelling-Goldberg Productions, 25 Cal. 3d 860, 868 (1979).

Regardless of one's artistic tastes or personal reaction to "*Terryworld,*" it is an art book entitled to First Amendment protection. As one viewer said, "*Terryworld* is not just a sexy coffee table book designed to push the envelope, it's a big beautiful book that validates the art within by its own class and design." Weinsten Decl. ¶ 8, Exh. 16. Accordingly, Mr. Richardson is entitled to the protection of the anti-SLAPP statute.

C. The Publication of *Terryworld* And The Photographs At Issue Concern a Matter Of Public Interest

On this point there is no doubt at all, since the California Legislature has expressly codified its finding that "there is [] a public interest in preserving the integrity of cultural and artistic creations." Cal. Civil Code § 987. The public interest in the exhibition of artwork is further demonstrated by the legislature's express exclusion of artistic works from the anti-SLAPP exemptions codified at Cal. Code Civ. P. § 425.17.[2] Subsection (d)(2) of § 425.17 expressly excludes from the listed exemptions "[a]ny action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work . . ." Cal. Code Civ. P. § 425.17(d)(2). The Legislature could not be more clear: Works of art *per se* fall within the public interest, and are protected under the anti-SLAPP statute.

[2] Cal. Code Civ. P. § 425.17 exempts from the provisions of § 425.16 certain public enforcement actions, certain actions brought for the public benefit, and certain claims against business entities.

Public interest is also inherent where the protected speech involves public figures, or those who have placed themselves in the public's eye. "Public interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities." Dora, 15 Cal. App. 4th at 542 (holding that a video documentary on the early days of surfing in Malibu was of public interest and, therefore, that the producers had right to use photographs of plaintiff, a Malibu surfer in the 1950's, without his consent). See also Carlisle v. Fawcett Publications, Inc., 201 Cal. App. 2d 733 (1962), a right of privacy case, in which the Court of Appeal held:

> there is a public interest which attaches to people who by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities. . . . Certainly, the accomplishments and way of life of those who have achieved a marked reputation or notoriety by appearing before the public such as actors and actresses, professional athletes, public officers, noted inventors, explorers, war heroes, may legitimately be mentioned and discussed in print or on radio or television. . . .
>
> 'A person may, by his own activities or by the force of circumstances, become a public personage and thereby relinquish a part of his right of privacy to the extent that the public has a legitimate interest in his doings, affairs, or character.' [Citation omitted].
>
> A necessary corollary is that people closely related to such public figures in their activities must also to some extent lose their right to the privacy that one unconnected with the famous or notorious would have. If it be objected that the mere relationship with some public figure should not subject a person to a qualified loss of his privacy, the identical observation could be made logically as to the man held up on the street, the householder who is burglarized, or the victim of an accident; all may be equally unwilling to be publicized.

Id. at pp. 414-415.

In Selig v. Infinity Broadcasting Corp., 97 Cal. App. 4th 798 (2002), the Court of Appeal considered whether certain derogatory comments made on air by a radio talk show host about the plaintiff (a woman who appeared for one minute on the TV show *Who Wants To Marry A Multimillionaire*) were subject to the anti-SLAPP statute. The woman had refused to appear on the radio show for fear of being ridiculed, and the host joked about this, calling her names such as "chicken butt" and "skank." In determining whether the offending comments were of public interest, the Court noted initially that *Who Wants To Marry A Multimillionaire* had generated considerable debate and interest. The Court went on to state that "*[b]y having chosen to participate* as a contestant in the TV show, plaintiff voluntarily subjected herself to inevitable

scrutiny and potential ridicule by the public and the media." Id. at 808 (emphasis added). In response to plaintiff's argument that the offending comments were not directed at her participation in the TV show, but rather her refusal to appear on radio, the Court stated that the public interest "requirement, like all of section 425.16, is to be 'construed broadly' so as to encourage participation by all segments of our society in vigorous public debate related to issues of public interest." Id.. See also Ingalls v. Westwood One, 129 Cal. App. 4th 1050 (2005) (lawsuit stemming from criticisms leveled against individual who called into a radio talk show held subject to anti-SLAPP statute).

In Creel v. Crown Publishers, Inc., 496 N.Y.S.2d 219 (1985), the Supreme Court of New York considered whether the publication of a nude photograph of plaintiffs, taken without their consent at a nude beach and published in a guide on nude beaches, violated New York's right of privacy law. In holding that it did not, the Court stated:

> A guide to beaches where nude bathing is permitted is a matter of some public interest and the use of photographs with the text is protected by constitutional safeguards and is outside the protection of the Civil Rights Law. The focus of inquiry in applying the 'public interest' exception is not only upon the particular photograph but also upon the article or book within which the photograph appears. Here the photograph was utilized to illustrate a guide book which disseminated information concerning a matter of public interest and was not, therefore, utilized for purposes of "trade" within the meaning of the Civil Rights Law.

Id at p. 220. See also Gaeta v. Home Box Office, 645 N.Y.S.2d 707 (1996), holding that a segment on HBO's "Real Sex" about public reactions to nude photography was a matter of public interest, and that accordingly the unauthorized use of plaintiff's picture in the segment could not constitutionally be treated as a violation of state privacy laws.

In this case, of course, Mr. Lopera put himself into the public eye, and made himself a figure of public interest for at least the purposes of this litigation, by agreeing to pose nude for a internationally-famous art photographer and by signing a release permitting the photographs to be displayed to the public. The fact that the plaintiff actually consented to having his pictures

displayed publicly makes this case even more compelling than Selig, Ingalls, Creel and Gaeta, in which there was ***no*** consent to the challenged speech.[3]

There can be no reasonable dispute that *Terryworld* and the Lopera photographs are a matter of public interest, and indeed one need not look beyond the enormous crowds that gathered for the opening of the T*erryworld* exhibition at the Deitch Projects in Soho, See, e.g., Weinsten Decl. ¶ 4, Exh. 11. ("a savagely attended opening at the Zeitgeist-central Deitch Projects in Soho, during which thousands of rabid downtown kids gleefully braved a human stampede and near inhumane temperatures for a glimpse of Mr. Richardson's latest photographic foray . . ."), or the numerous articles that have been written about *Terryworld* and Mr. Richardson (Weinsten Decl. Exhs. 9-13 & 16), or the attention that the book has drawn to Mr. Richardson's web site. Richardson Decl. ¶ 16.

Because *Terryworld* and the Lopera pictures involve matters of public interest, the Court must apply the second step of the anti-SLAPP analysis and conduct a review of the evidence on both sides of the controversy. Because the plaintiff cannot demonstrate a probability of success on the merits, his action must be dismissed.

D. The Plaintiff Cannot Establish The Probability Of Success On The Merits

The Complaint in this case alleges five causes of action, styled as "Invasion of Privacy-Misappropriation of Likeness," "Invasion of Privacy- Public Disclosure of Private Facts," "Invasion of Privacy- Right of Publicity," "Intentional Infliction of Emotional Distress," and "Negligence." All of these causes of action depend entirely upon the single, and demonstrably false, allegation that the defendants were not authorized to use the photographs at issue. See, e.g.,

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[3] Regardless of whether or not Mr. Lopera can be considered a public figure, there is no question that the First Amendment rights at issue here involve numerous other public figures. *Terryworld* is a single work and is the creation of one of the most prominent and controversial photographers of this day, and the book features numerous celebrities including actors Samuel L. Jackson, Dennis Hopper, McCauley Caulkin, Viggo Mortenson, Johnny Knoxville, Joaquin Phoenix, Juliet Lewis, musician Vincent Gallo, comedian Eddie Izzard, the band Rancid and Mr. Richardson himself. See *Terryworld*, lodged with the Court. Because the First Amendment rights implicated here involve not just the use of four photographs, but the dissemination of an entire book, the Court must consider the public's interest in seeing all of the photographs, not just the Lopera ones. See, e.g., Creel, 496 N.Y.S.2d at p. 220, holding that in assessing public interest under the Constitution, courts must consider the entire book and not just the individual challenged photographs.

Complaint ¶ 17 (Misappropriation of Likeness), alleging that "[t]he defendants misappropriated said photographs, images and likenesses . . . ***without Mr. Lopera's consent*** or authorization . . ."; Complaint ¶ 23 (Public Disclosure of Private Facts), alleging damages "[a]s a direct result of Defendants' unlawful and ***unauthorized*** use and exploitation of Mr. Lopera's photographs. . ."; Complaint ¶ 38 (Negligence), alleging that "[d]efendants, and each of them, owed a duty to plaintiff not to use his photographs and images ***without his consent***"). (emphasis added).

The plaintiff cannot meet his burden on any of these causes of action, because he signed a valid release expressly permitting Mr. Richardson, and those acting with his permission, to use his pictures "for any purpose whatsoever." Richardson Decl. ¶ 11, Exh. 5. Moreover, having denied that any release ever existed at all, it is too late for the plaintiff to revise his complaint to plead the insufficiency of his June 18, 1998 release. Doing so would contravene the rules against "sham" pleading. See, e.g., Amid v. Hawthorne Community Medical Group, 212 Cal. App. 3d 1383, 1391 (1989), refusing to allow amendment of a complaint to allege breach of an express oral agreement when the prior pleadings denied the existence of such an agreement; and Kessler v. Lauretz, 39 Cal. App. 3d 441 (1974), dismissing a complaint as a sham when its allegations were contrary to a judicially-noticeable agreement between the same parties.

In the face of his release – which might not be cognizable on demurrer but which *is* reviewable as part of this SLAPP motion – the plaintiff cannot possibly demonstrate a probability of success on the merits. Accordingly, this extortionate lawsuit can and must be dismissed.

E. The Plaintiff Should Be Ordered To Pay Mr. Richardson's Attorney Fees.

Cal. Code Civ. P. § 425.16(c) establishes the rule that "a prevailing defendant on a special motion to strike ***shall*** be entitled to recover his attorney fees and costs." (emphasis added). On its face, the rule is mandatory, not discretionary, and so the plaintiff must also be ordered to pay the fees and costs associated with this motion.

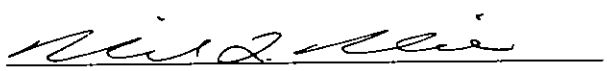
IV.

CONCLUSION.

For all of the reasons set forth herein, the Superior Court should grant this Special Motion to Strike the entirety of the plaintiff's Complaint and enter judgment in favor of the defendants and award defendant his fees and costs.

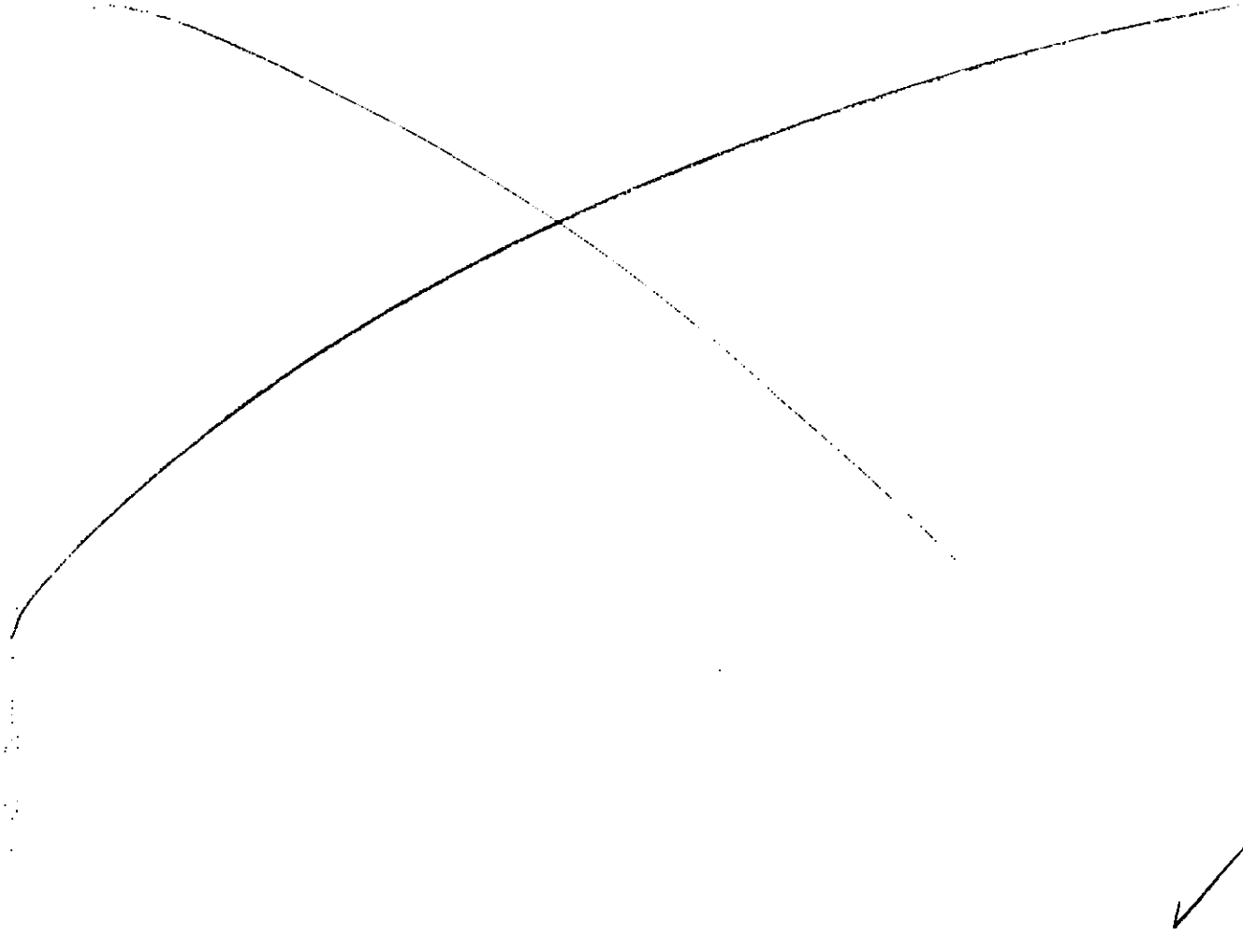
Dated: January 18, 2006

LINER YANKELEVITZ
SUNSHINE & REGENSTREIF LLP

By: 

Michael L. Novicoff, Esq.
Attorneys for Defendant
TERRY RICHARDSON

DECLARATION
HAGENDORF



DECLARATION OF SCOTT HAGENDORF

I, Scott Hagendorf, declare as follows:

1. I am the CEO of LTI Labs. a photo lab in New York City, and am over the age of 18. In 1997 and 1998, LTI was the primary photo lab to Terry Richardson and developed thousands of Richardson photographs. The following facts are of my own personal knowledge and, if called to testify, I could and would competently testify thereto under oath.

2. Attached hereto as Exhibit 1 are true and correct copies of contact sheets LTI printed from negatives developed for Mr. Richardson. The sheets are redacted so as to exclude photographs I am told are not at issue in the instant lawsuit. On the back of those contact sheets, LTI affixed certain job numbers for the rolls developed. It is our standard practice to include the job numbers on the back of each contact sheet we create to permit easy reference and tracking of negatives. The job numbers for these contact sheets are 322590-8 and 322590-3.

3. Attached as Exhibit 2 is a true and correct copy of the lab log for job number 322590, which includes the contact sheets referenced in paragraph 2 above. A lab log records, among other things, the date a particular job is performed. It is our standard practice to keep these types of records for billing and other purposes. The lab log attached demonstrates that the photographs from job number 322590, and the contact sheets described in Exhibit 1, were developed on November 22, 1997.

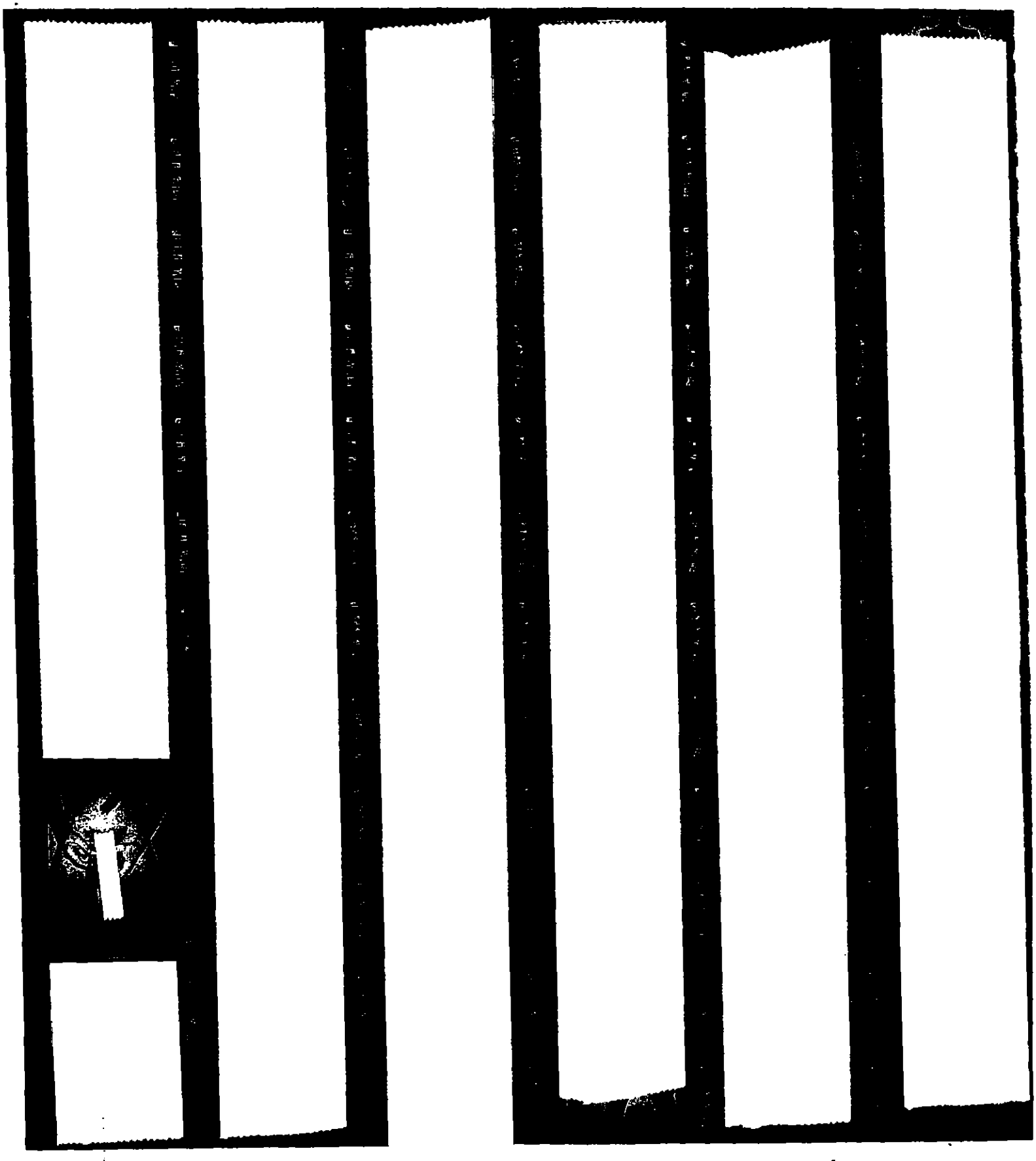
4. Attached hereto as Exhibit 3 is a true and correct copy of a contact sheet LTI printed from negatives developed for Mr. Richardson redacted to eliminate photos that I am informed are not at issue in the instant lawsuit. The job number for this contact sheet was written on the back of the contact sheet at the time it was printed. The job number for this contact sheet is 330912-16.

5. Attached hereto as Exhibit 4 is a true and correct copy of the lab log for job number 330912, which includes the contact sheet attached as Exhibit 3. As demonstrated by this lab log, the negatives for this job, including the photos in Exhibit 3, were developed on July 7, 1998.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 12th day of January, 2006, at New York, New York.

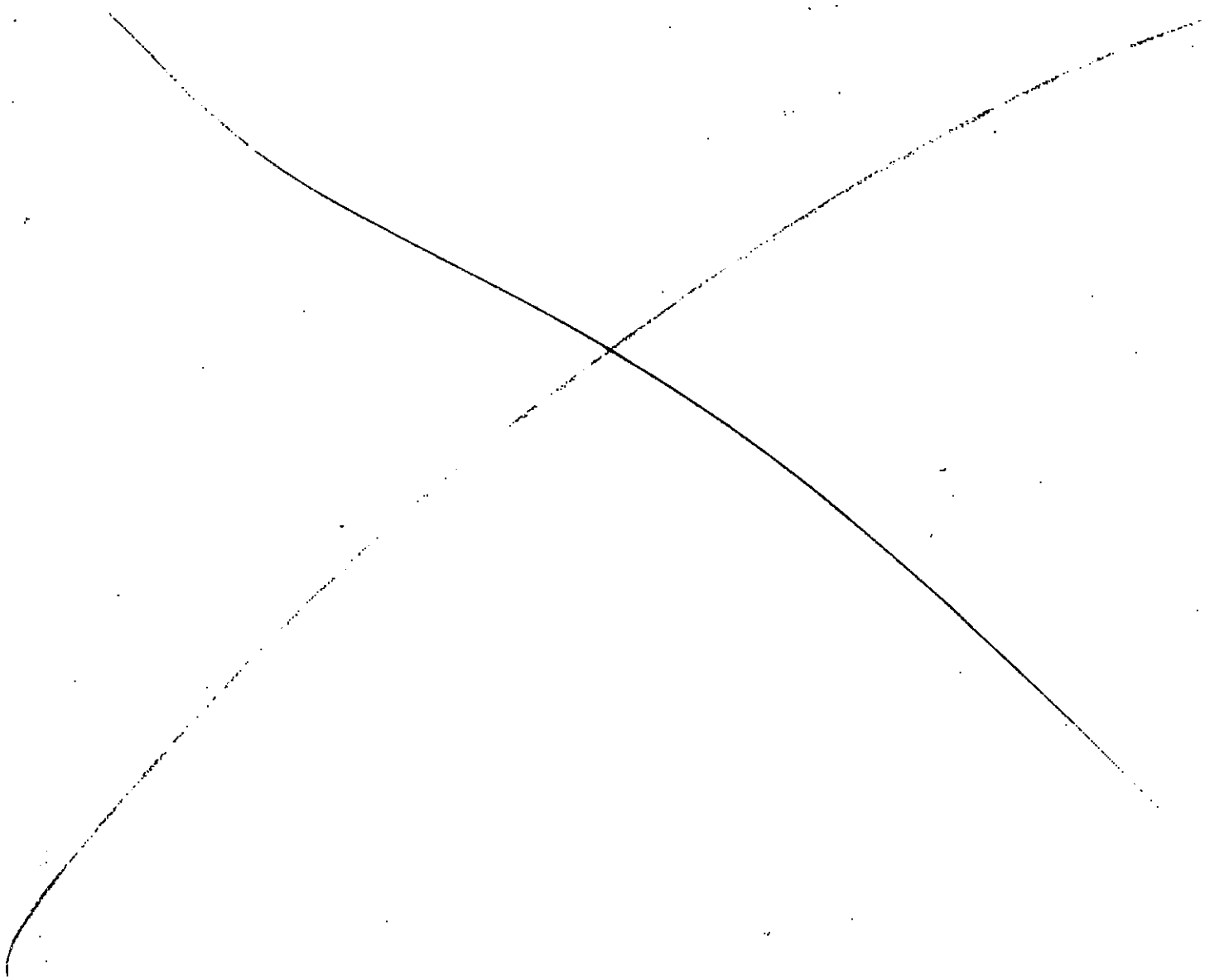
Scott Hagendorf

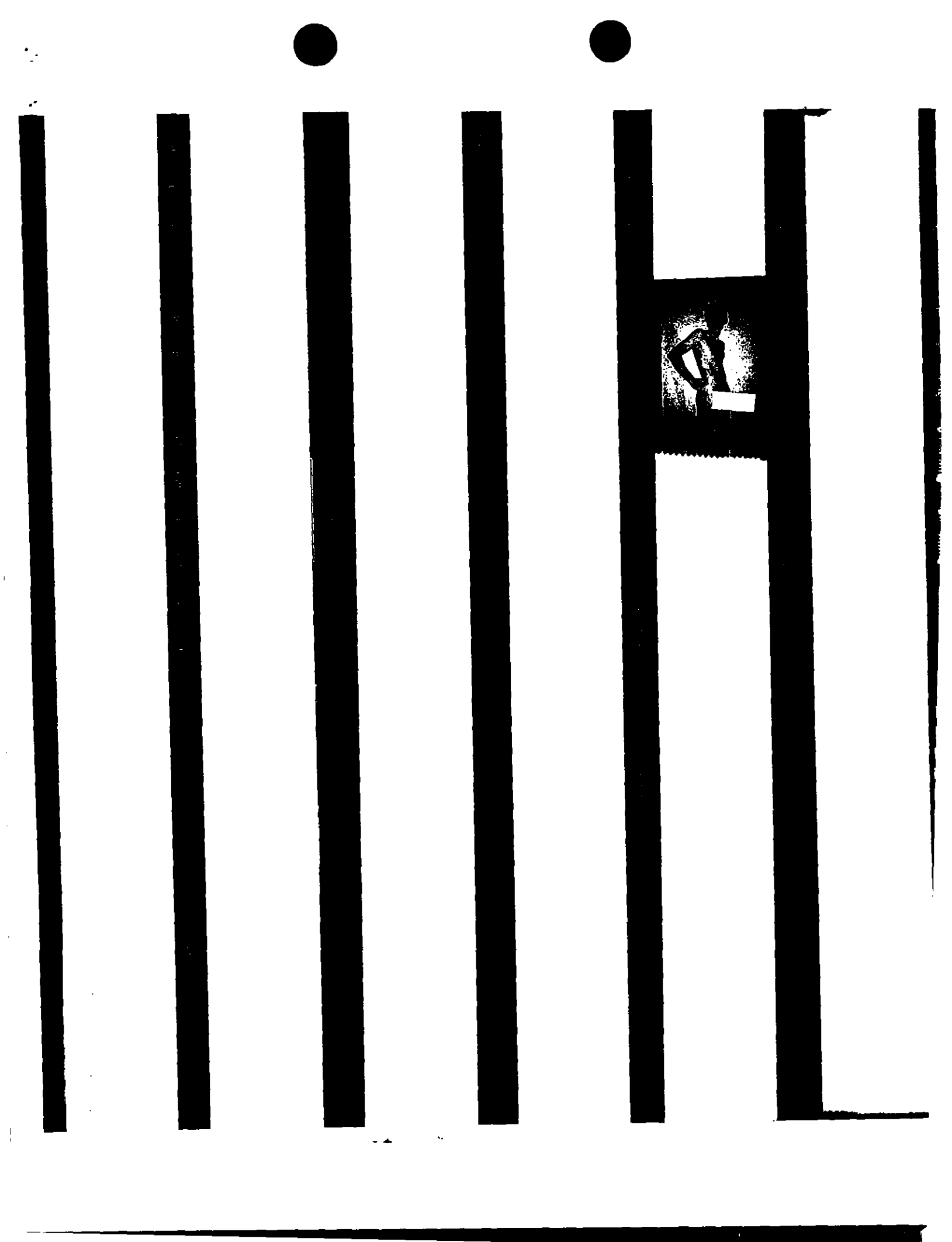


EXH-1

3

322590-3





322590-8

8

BIN E

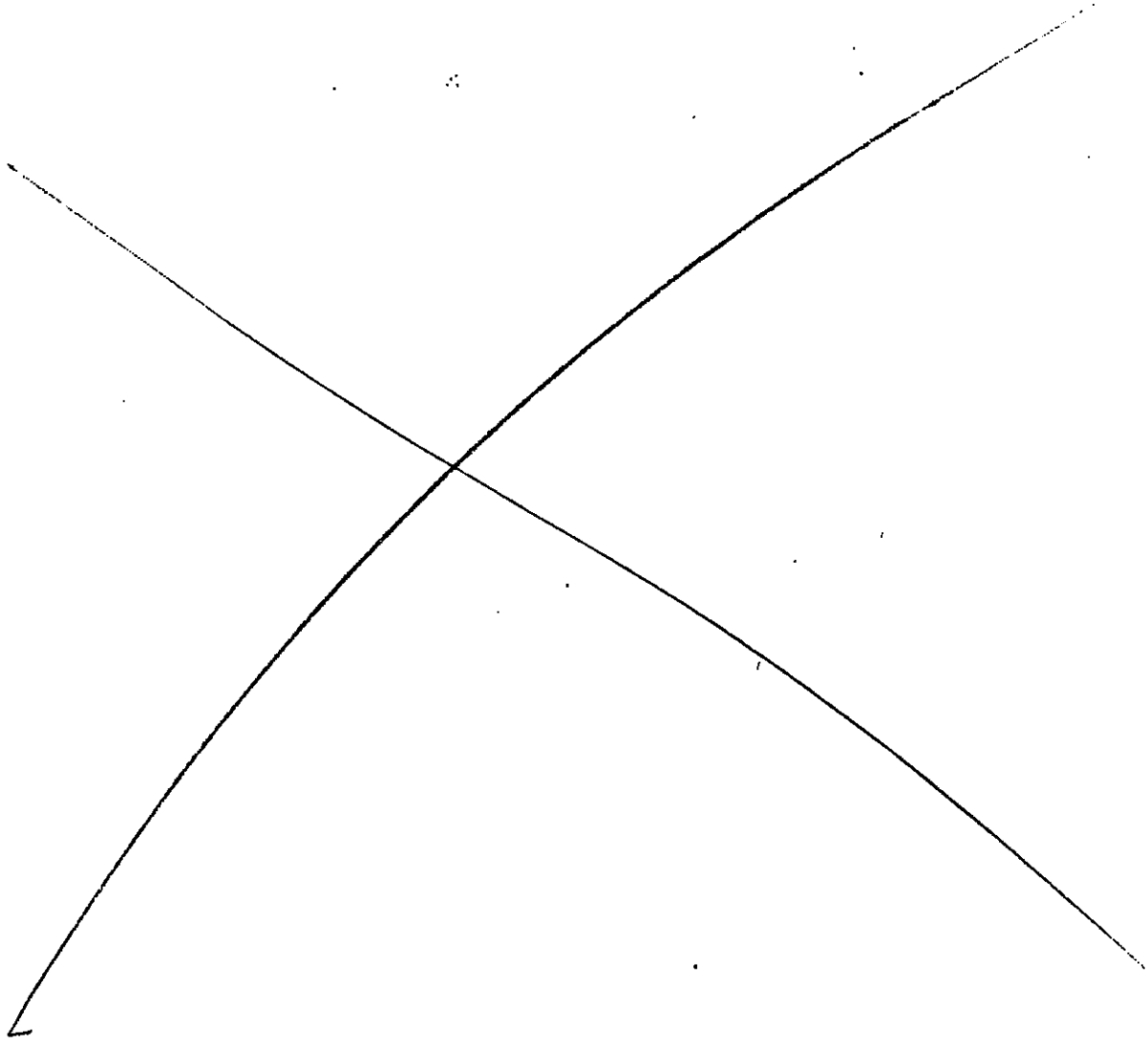
Photographer: Terry Richardson

Date	Job #	Client	Story	# of rolls
53100	704496			2(220)
53100	714259			15(135)
53100	705085			3(135)
53100	715560			4(135)
53100	714270			19(135)
53100	704805			10(135)
53100	47807-47816			10(135)
53100	703593			25(135)
53100	903231			7(135)
53100	703975			4(135)
53100	714936			3(135)
53100	700656			7(135)
53100	700268		Eden Park	28(220)
53100	704555			19(220) 20(120)
53100	716097		Sisley	124(135)
62100	331054		mondi	24(120) 77(
62100	706059		nova '00	28(135)
62100	715648	Nova	Feb' 00	41(135)
62100	714314	H+M		29(220)
62100	714095	H+M	men	35(220)
62100	715000	Nova	March 00'	74(120)
2899	703800	B. vogue		30(135)
53100	704608	index		11(220)
53100	705070	S2 Mag.		6(220)
53100	704890	vogue Japan	jet set	15(220) 1(120)
62100	703218	George Mag.	circus Beauty	11(220) 16(135)
62100	700633	George mag		61(135)
81500	707792			68(220)
July 00'	707790		Spice Girls 00'	94(135)
111097	325044	Harper Bazaar	N.Y. collection	40(135)
112297	522590	badgeworldwide		23(135)
111898	330175	Kathy Barker	Sisley Fall 98	62(135)
12798	336033	A+R media	mondi	50(220)
	329833	Beneton	services corp	90(135)
52500	703585			15(135)
6198	335634	air Agency	C. Paeloth	32(220)

EXH-2

EXH. 3

330912-16

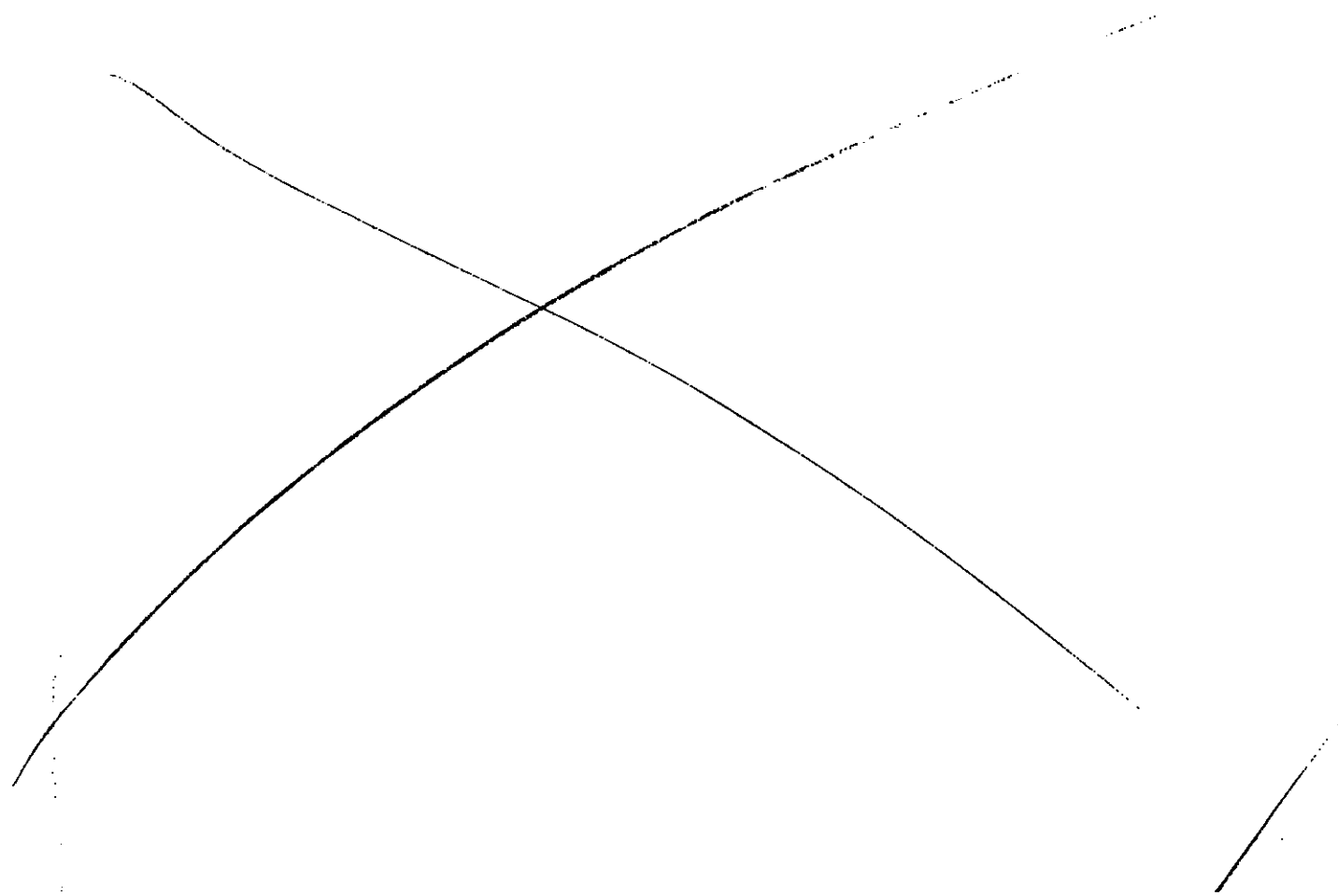


Photographer: Terry Richardson

Date	Job #	Client	Story	# of rolls
36916	313867	allure	Jconnelly	10(135)
37916	3139666	Details	The story S	7(135)
[illegible]	314652	German Amica		40(220) 2(120)
41596	314725	Details	White Courtesy	13(135)
71596	315745	~~Details~~ S DUH M	NIKKI+Teresa	17(135)
71596	3157446	Details	Mia Kisshones	10(135)
86916	315885	Katy Barker	A German A	54(220)
830916	3166633	Details	Corall	7(135)
1205916	317398		Arena Homme	30(220)
51596	317840	G mag	uniforms	24(220)
51796	317857	G mag	uniforms	1(120) 9(220)
530916	317914	Details	military story	24(135)
522916	317947	K Barker	Levis	1(135)
118916	3166382	allure	a new day	82(135)
11296	319923	K. Barker	E. Levis	120(135)
112596	319973	Wave Homme		18(135) 1(120) 28(220)
1698	336896	Harpers Bazz	Tv actress	3(135)
31196	313422	Details	white jacket	9(135)
38916	312968	G mag	B.H. McCaughey	3(135)
51498	336212	spin mag	Duncan Shenk	4(135)
[illegible]916	4088-4190	Details	Joey Adams	72(135)
21696	3197888	the face	~~Bar~~ Steve Tyler	4(135)
43098	3343416	allure	park fashion	14(220)
64498	334832	Hold Biling		9(135)
7396	3156416	W mag	Mexico City	48(135)
11697	3168841			18(135)
122916	317382	Katy Baker	20 ans	18(135)
53096	317601	Details		25(135)
52096	317819	George	uniform	5(220) 12(120)
72498	330912	Bazaar	Opening Night	27(135)
91598	330854	Visty	Iserelon	30(135)
31698	338447	Spin	Sean Lennon	7(135)
121798	331847	mix	call Girl	29(220)
112596	333517	H&L Prod.		41(220) 8(135)
113198	333520	Adura Tayana	Atsira	17(220) 3(135)
12509	333809	N.Y Times	Runway	8(220)

EXH-4

DECLARATION
WIEDERIN



DECLARATION OF ALEX WIEDERIN

I, Alex Wiederin, declare as follows:

1. I am a freelance art director and am over the age of 18. As an art director, I have worked with both defendant Terry Richardson and plaintiff Frank Lopera (who goes by the nickname "Speedy") and know them personally. The following facts are of my own personal knowledge and, if called to testify, I could and would competently testify thereto under oath.

2. In June 1998, I was working in Los Angeles, California with Mr. Richardson on a photo shoot for Monde. I was present on June 18, 1998 when Mr. Richardson called Mr. Lopera to come down to the shoot to sign a Release concerning photographs Mr. Richardson had previously taken of Mr. Lopera. At that point in time, Mr. Lopera was not involved in the Monde shoot. When Mr. Lopera arrived, and in my presence, Mr. Richardson told Mr. Lopera that he needed a Release of all of the pictures he had taken of Mr. Lopera and that he would be using them in an art show and also in his books. Mr. Lopera agreed without any hesitation, and I personally witnessed him sign the Release. During that meeting, Mr. Lopera said nothing about limiting the Release to any particular pictures. Nor did he ask to limit it in any other way.

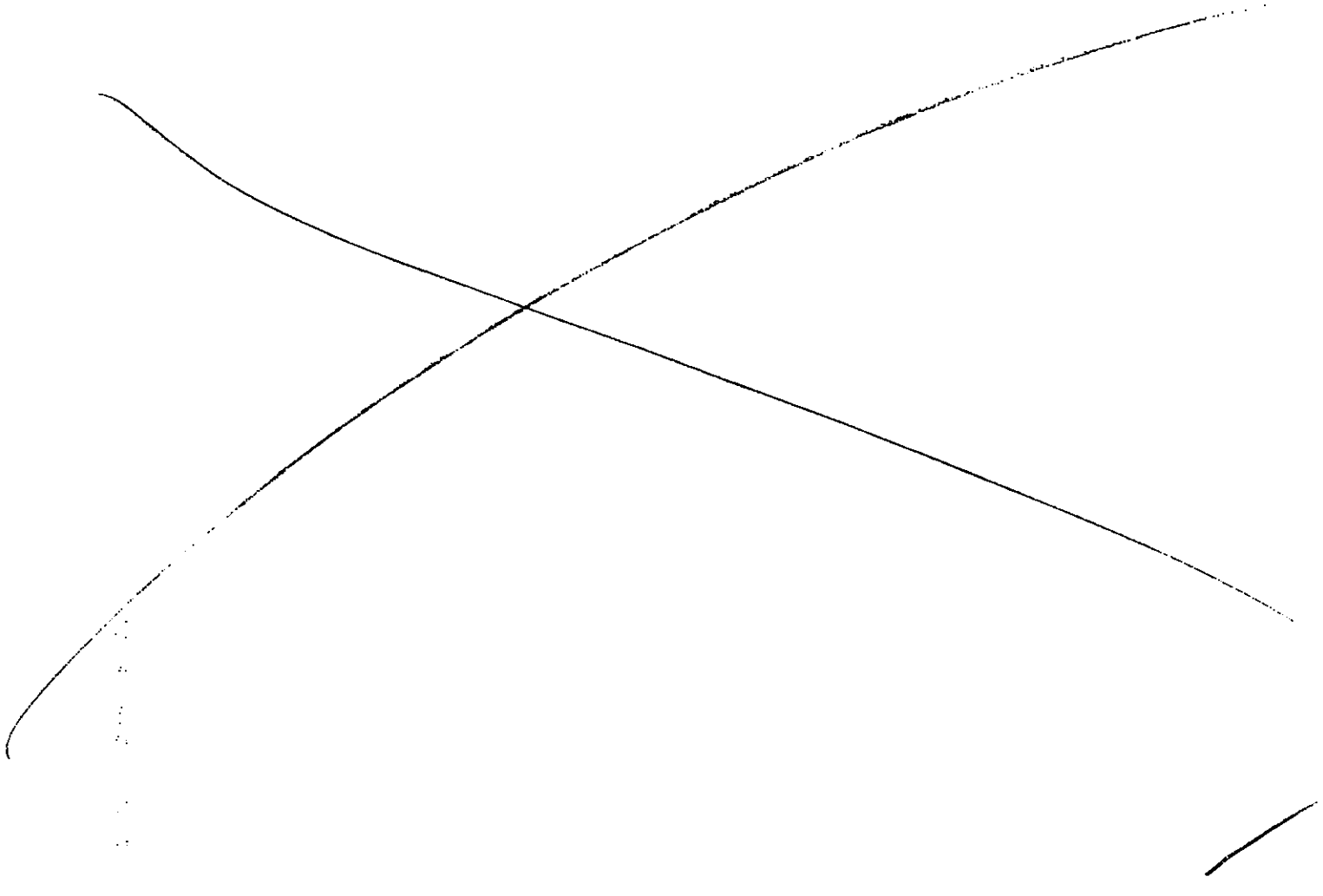
3. After Mr. Lopera signed the Release, Mr. Richardson and I decided to offer Mr. Lopera a job on the Monde shoot. Mr. Lopera accepted and was paid for that work.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 10 day of January, 2006, at New York, New York.

Alex Wiederin

DECLARATION
RICHARDSON



DECLARATION OF TERRY RICHARDSON

I, Terry Richardson, declare as follows:

1. I am a defendant in this action and am forty years of age. I am currently employed as a professional photographer and have been for the past twelve years . I am the son of Bob Richardson, the well known fashion photographer. The facts stated herein are of my own personal knowledge and, if called to testify, I could and would competently testify thereto under oath.

2. Over the course of my career, I have photographed many famous actors, musicians and other celebrities. The list includes, among others, Daniel Day Lewis, Faye Dunaway, Leonardo DiCaprio, Vincent Gallo, Sharon Stone, Mickey Rourke, Jay Z, 50 Cent, Mena Suvari, Nicolas Cage, Dennis Hopper, Catherine Deneuve, the Spice Girls, Samuel L. Jackson, McCauley Caulkin, Viggo Mortenson, Joaquin Phoenix and Juliet Lewis. Many of these celebrities are included in my book, *Terryworld*, which was published by Taschen in October 2004.

3. My work has been the subject of numerous books, including *Hysteric Glamour*, *Son of Bob*, *Feared by Men Desired By Women*, *Too Much*, *Terryworld and Kibosh*. My work (as well as my personal life) has also been the subject of numerous articles in both mainstream and alternative media, and has been discussed in scholarly works pertaining to my industry, including *XXX: The Power Of Sex In Contemporary Design* (Rockport 2003). I am also regularly contacted by university and graduate students seeking to write papers and/or their thesis about my work.

4. My photographs have been exhibited in group shows as well as one man shows in such prominent galleries as The Alleged Gallery in New York City, The Shine Gallery in London, Gallery Emanuel Perriton in Paris and The Parco Gallery in Japan, and have been published in top magazines throughout the world, including Vogue, French Vogue, British Vogue, Japanese Vogue, I-D, Dazed and Confused, GQ, Harper's Bazaar, W, and Purple.

5. I have photographed campaigns for companies such as Gucci, Sisley, Tommy Hilfiger, Miu Miu, Levi's, Eres, Chloe, APC, Caroline Herrerra, Nike and Kenneth Cole.

6. I first met Frank Lopera in or around January 1997 on a fashion shoot. I have shot at least four jobs using Mr. Lopera, none of which involved nudity.

7. The first time I photographed Mr. Lopera in the nude was in November, 1997 in New York. Two of the photographs at issue in Mr. Lopera's Complaint were taken during that shoot. I sent the film to LTI Labs in New York to be developed and, as demonstrated by the lab reports I obtained from that shoot (which are attached to the declaration of Mr. Hagendorf), the film was processed on November 22, 1997. Mr. Lopera's claim that these photos were taken in 1995 or 1996 is simply false. It is my practice to have my pictures developed as quickly as practical after a shoot, usually within days if not the same day.

8. It is also my practice not to shoot models under the age of 18 and, in this case, Mr. Lopera told me that he was nineteen at the time I took the photographs in 1997.

9. The next time I shot nude photos of Mr. Lopera was in June 1998 in Los Angeles. As demonstrated by the contact sheets and LTI Lab reports I obtained from LTI Labs (which are also attached to Mr. Hagendorf's declaration), this film was developed on July 7, 1998. The reason for the slight delay in development was that the pictures were taken when I was on a project in Los Angeles, and I had to wait until I returned to New York to have them developed at LTI. One of the photographs at issue in the Complaint was taken at that shoot.

10. The last photograph at issue in the Complaint, depicting Mr. Lopera fully clothed, was taken in 1998 on a shoot for Spin Magazine. This photograph was taken in Los Angeles before the June 1998 shoot and is the only one at issue not developed by LTI Labs.

11. Shortly after the June 1998 shoot, I contacted Mr. Lopera and asked that he sign a release for ***all*** of the photographs I had taken of him. I explained to Mr. Lopera that I planned to use the photographs in an art show and in books. Mr. Lopera agreed without hesitation and, on June 18, 1998, met with me on the set of a shoot for Mondi to sign the release. Alex Wierdin was present when the release was signed and a witness to my conversation with Mr. Lopera regarding the scope of the release and use of the photographs. A true and correct copy of the release signed by Mr. Lopera is attached hereto as Exhibit 5. After the release was signed, Mr. Wiederin and I offered Mr. Lopera a job on the Mondi shoot, for which he was paid.

12. Mr. Lopera has never in any way suggested or said to me that the release was not valid or applicable to photographs I have taken of him. On its face, the release is not limited to any

particular photographs but rather permits me to use any photographs taken of Mr. Lopera at any point in time. In fact, even in his Complaint he makes no such claim, but rather falsely states that he never signed any release at all.

13. Photos from the 1997 shoot with Mr. Lopera (including two at issue in this case) were first published in September 1998, with the release of *Hysteric Glamour*, my first book, and were displayed in an art show which corresponded with the release of that book. Mr. Lopera attended the art show and was shown a copy of the book. For five years he gave no indication at all that he was concerned about the use of his photographs. In fact, over this period of time, Mr. Lopera continued to work with me and used my notoriety to try to further his career.

14. To my knowledge, the first time Mr. Lopera ever complained about my use of his photographs was in August 2003, five years after they were taken. Around August 26, 2003, I received through my lawyers a cease and desist letter from Mr. Lopera's attorney in New York. A true and correct copy of that letter is attached hereto as Exhibit 6. I was given no prior warning of the letter and was frankly shocked that someone I considered a friend would act in this way. The letter addressed the publication of several photographs from the 1997 shoot in *The Fourth Sex, Adolescent Extremes*, and alleged that "[a]t no time did he, or anyone on his behalf, grant permission, in writing or otherwise, for you to use these photographs." In response to the letter, I had my attorney forward a copy of the release Mr. Lopera signed with the expectation that the matter would be dropped. A true and correct copy of that letter, dated September 5, 2003, is attached hereto as Exhibit 7.

15. Attached hereto as Exhibit 8 is a true and correct copy of a letter dated September 24, 2003, from my attorney to Mr. Lopera's counsel. Among other things, the letter confirms a conversation wherein Mr. Lopera's counsel admitted that Mr. Lopera was born in April 1978 and, therefore, was 20 years old at the time he executed the release. After this exchange, the matter was apparently dropped, as I heard nothing further from Mr. Lopera or anyone representing him until 2005.

16. *Terryworld* was released by Taschen in October 2004. Within the first six months of the release, my website, TerryRichardson.com, received hundreds of thousands of "hits" (i.e.,

visitors). The book itself has sold thousands of copies. Despite the apparent popularity of the book, I will not make any money from the sales as I agreed to do the book for a flat fee of $25,000. I expect to spend more than that on this lawsuit alone.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 13 day of January, 2006, at New York City, New York.

Terry Richardson

Terry Richardson

MODEL RELEASE

For and in consideration of my engagement as a model by Terry Richardson, hereafter referred to as the photographer, on terms or fee hereinafter stated, I hereby give the photographer, his legal representatives and assigns, those for whom the photographer is acting, and those acting with his permission, or his employees, the right and permission to copyright and/or use, reuse and/or publish, and republish photographic pictures or portraits of me, or in which I may be distorted in character, or form, in conjunction with my own or a fictitious name, on reproductions thereof in color, or black and white made through any media by the photographer at his studio or elsewhere, for any purpose whatsoever; including the use of any printed matter in conjunction therewith.

I hereby waive any right to inspect or approve the finished photograph or advertising copy or printed matter that may be used in conjunction therewith or to the eventual use that it might be applied.

I hereby release, discharge and agree to save harmless the photographer, his representatives, assigns, employees or any person or persons, corporation or corporations, acting under his permission or authority, or any person, persons, corporation or corporations, for whom he might be acting, including any firm publishing and/or distributing the finished product, in whole or in part, from and against any liability as a result of any distortion, blurring, or alteration, optical illusion, or use in composite form, either intentionally or otherwise, that may occur or be produced in the taking, processing or reproduction of the finished product, its publication or distribution of the same, even should the same subject me to ridicule, scandal, reproach, scorn or indignity.

I hereby warrant that I am under/over twenty-one years of age, and competent to contract in my own name insofar as the above is concerned.

I am to be compensated as follows:

I have read the foregoing release, authorization and agreement, before affixing my signature below, and warrant that I fully understand the contents thereof.

DATED June 18, 1998

_____ L.S.
WITNESS

_____
ADDRESS

FRANK Lopera Speedy L.S.
NAME

[redacted]
ADDRESS NY 11378

I hereby certify that I am the parent and/or guardian of _____ an infant under the age of twenty-one years, and in consideration of value received, the receipt of which is hereby acknowledged, I hereby consent that any photographs which have been or are about to be taken by the photographer may be used by him for the purposes set forth in original release hereinabove, signed by the infant model, with the same force and effect as if executed by me.

Speedy
_____ L.S.
PARENT OR GUARDIAN

_____
ADDRESS

Photographer: 1–Fill in terms of employment.
2–Strike out words that do not apply.

EXH – 5

LAW OFFICES
OF
DANIEL CRUPAIN
225 BROADWAY
SUITE 2700
NEW YORK, N.Y. 10007

Of Counsel
PETER E. RHATICAN
MEMBER N.Y.& N.J BAR
DOUGLAS KAPLAN

(212) 529-4000
(718) 529-4000
(800) 529-4000

Fax (212) 406-6890

August 26, 2003

Terry Richardson
Richardson Studios
212 Bowery
Apt. #1
New York, NY 10002

Edizione Charta
Via Della Moscova 27
20121 Milan, Italy

Re: Frank Lopera

Gentlemen:

I am the attorney for Mr. Frank Lopera. You have caused to be published photographs of my client and are distributing them in the publication entitled "The Fourth Sex, Adolescent Extremes" without permission. These photographs depict my client, Frank Lopera, in nude and humiliating poses. At no time did he, or anyone on his behalf, grant permission, in writing or otherwise, for your use of these photographs.

We request that you immediately cease and desist from any further publication or use of these pictures. He has already suffered damages, both to his career as a professional actor, as well as personal pain and suffering, as a result of your use of these pictures, and he will be irreparably damaged from your continued use and exploitation in this publication.

We also request that you compensate him for the damages already suffered by him as a result of the use thus far made of these pictures.

Very truly yours,

DANIEL CRUPAIN

DC.ee

EXH-6

STOUT & THOMAS
ATTORNEYS
477 MADISON AVENUE
15TH FLOOR
NEW YORK, NEW YORK 10022-5802

(212) 754-6120

FAX (212) 754-6809

E-MAIL firm@stout-thomas.com

MICHAEL WARD STOUT
JOHN CHARLES THOMAS
ERIC R. JOHNSON

OF COUNSEL
EDWARD P. BANK
JEREMY J. BERMAN
BURTON G. LIPSKY

BY FAX (212) 406-6890

September 5, 2003

Daniel Crupain, Esq
225 Broadway, Suite 2700
New York, New York 10007

Re: Terry Richardson / Frank Lopera

Dear Mr. Crupain:

As you now know, we are the attorneys for Terry Richardson and are writing to you in response to your letter, dated August 26, 2003, to Mr. Richardson and Edizione Charta regarding your client Frank Lopera.

In your letter, you claim that photographs taken by Mr. Richardson of Mr. Lopera were published without the permission of your client, in writing or otherwise. I attach a copy of the release, dated June 18, 1998, and signed by Mr. Lopera. The release gives Mr. Richardson, among other things, "*...the right and permission to copyright and/or use, reuse and/or publish, and republish photographic pictures or portraits of [him]...*". As such, we believe your client's claim is without merit.

Mr. Richardson was surprised to receive your letter, given that he thought he and Mr. Lopera were friends and because Mr. Lopera willingly agreed to be photographed and consented to the publication of the photographs by signing the release referenced above. I understand from Mr. Richardson that Mr. Lopera knew the photographs would be published and that Mr. Richardson gave to Mr. Lopera some time ago a copy of a book in which Mr. Lopera appears. Mr. Lopera did not at that time express any disappointment with Mr. Richardson's work.

.../...

EXH - 7

STOUT & THOMAS

In any event, Mr. Lopera clearly granted Mr. Richardson the right to publish the photographs. We trust that the information contained in this letter should be enough to put this matter to rest.

Sincerely,

Eric R. Johnson

cc: Terry Richardson

Attachment

STOUT & THOMAS
ATTORNEYS
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15TH FLOOR
NEW YORK, NEW YORK 10022-5802

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JOHN CHARLES THOMAS
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EDWARD P. BANK
JEREMY J. BERMAN
BURTON G. LIPSKY

BY FAX (212) 406-6890

September 24, 2003

Daniel Crupain, Esq.
225 Broadway, Suite 2700
New York, New York 10007

Re: Terry Richardson / Frank Lopera

Dear Mr. Crupain:

I wrote to you on September 5th advising you that my client Terry Richardson held a valid release in his possession for the photographs he took of your client Frank Lopera. Before that moment, you did not know that the release existed.

While I assumed that that would have been enough to satisfy you that your client's claims were without merit, you surprised me by calling on September 10th and advising me that you had reason to believe that your client Frank Lopera was underage at the time Terry Richardson photographed him. You made this allegation during the same conversation that you confirmed to me that your client's date of birth was April 23, 1978 and with full knowledge that the release signed by Mr. Lopera was dated June 18, 1998. Simple math would tell you that Mr. Lopera was 20 years old in 1998. Terry Richardson only met Mr. Lopera for the first time that same year. He distinctly remembers that Mr. Lopera showed him proof of his age at the time of the shoot. If he had not been able to prove his age, then Mr. Richardson would not have conducted the shoot.

You stated to me that the next time I might hear from you would be in court. You should know that there is no possible way that you can have a basis for alleging that your client

.../...

EXH-8

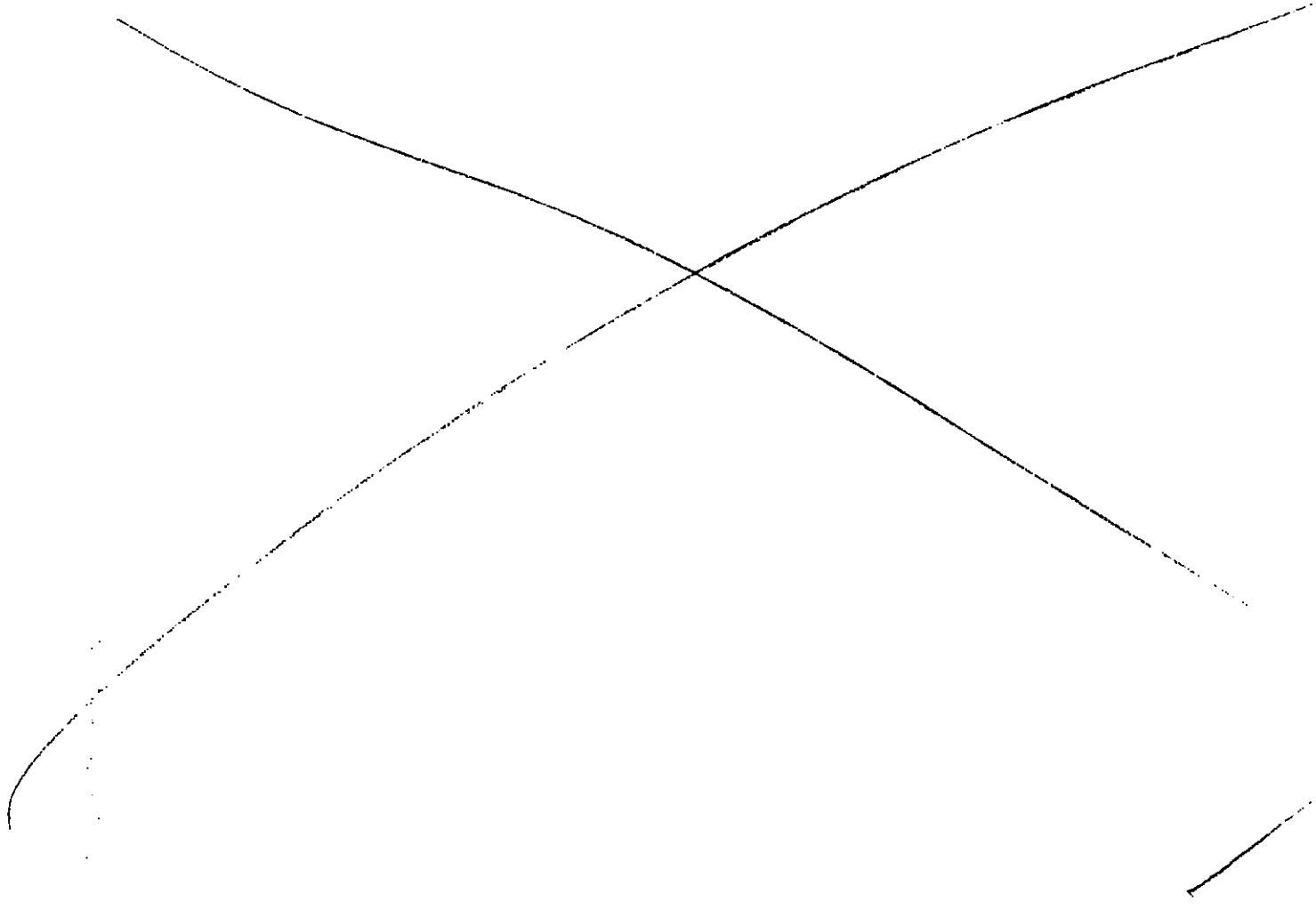
was underage at the time of the shoot. We take such threats and allegations to be very serious and consider them defamatory. If your baseless and false allegations continue, we will vigorously defend against them and assert claims of defamation against both you and your client.

Sincerely,

Eric R. Johnson

cc: Terry Richardson

DECLARATION
WEINSTEIN



DECLARATION OF MICHAEL E. WEINSTEN

I, Michael E. Weinsten, declare as follows:

1. I am an attorney at law duly licensed to practice before all of the courts in the State of California. I am a partner of the law firm of Liner Yankelevitz Sunshine & Regenstreif LLP, counsel of record for Terry Richardson in this action. I have personal knowledge of the facts set forth in this Declaration and, if called as a witness, could and would testify competently to such facts under oath.

2. Attached hereto as Exhibit 9 is a true and correct copy of an October 1, 2005 article from Photo District News titled "The 25 most influential living photographers" which was obtained using the Lexis search service.

3. Attached hereto as Exhibit 10 is a true and correct copy of an article from New York magazine titled "Sure Shot" which I obtained from the internet.

4. Attached hereto as Exhibit 11 is a true and correct copy of an article from LA Weekly magazine titled "It's Terry's World and You're Just Afraid of It" which I obtained from the internet.

5. Attached hereto as Exhibit 12 is a true and correct copy of a press release from Deitch Projects regarding the opening of *Terryworld* which I obtained from the Dietch Projects website.

6. Attached hereto as Exhibit 13 are true and correct copies of pages from *XXX: The Power Of Sex In Contemporary Design* (Rockport 2003) featuring and commenting on works by Terry Richardson.

7. Attached hereto as Exhibit 15 is a true and correct copy of a Person Summary Report including information on plaintiff Frank Lopera obtained from Lexis/Nexis using the SmartLinx people search function. The report indicates that a Frank Lopera who at one point resided at 6219 53d Avenue in Maspeth New York, the same address given by plaintiff on the release he signed, was born in April 1978. Attached hereto as Exhibit 14 is true and correct copy

of a People Search Report on plaintiff Frank Lopera obtained using the search tool provided by intelius.com. This report indicates that plaintiff was born on April 28, 1978.

8. Attached hereto as Exhibit 16 is a true and correct copy of an article regarding *Terryworld* I obtained from the website Mondopopsickle.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 17th day of January, 2006, at Los Angeles, California.

Michael E. Weinsten

3 of 126 DOCUMENTS

ASAP

Photo District News

October 1, 2005

SECTION: No. 10, Vol. 25; Pg. 30; ISSN: 1045-8158

IAC-ACC-NO: 137911916

LENGTH: 602 words

HEADLINE: The 25 most influential living **photographers.**

BODY:

In an online poll conducted earlier this year, we asked our readers to name the most influential living **photographers.** The 25 you selected are listed below—in strictly alphabetical order. These 25 **photographers** are mentors, teachers, role models. They have forged new techniques, explored new subjects, and taken **photography** into new, provocative or exciting territory. As a tribute to these influential masters, we invited portrait **photographers to photograph** artists who had influenced them. Other **photographers** were proud to share portraits with us that they have had the privilege of shooting in the past. Portraits and self-portraits of all 25 of these influential **photographers** can be found this month on our Web site, <www.pdnonline.com>.

Philip-Lorca diCorcia

William Eggleston

Elliott Erwitt

Robert Frank

Lee Friedlander

Nan Goldin

Andreas Gursky

Nadav Kander

Josef Koudelka

David LaChapelle

Annie Leibovitz

Jay Maisel

Sally Mann

Mary Ellen Mark

James Nachtwey

Arnold Newman

Martin Parr

Irving Penn

Eugene Richards

EXH— 9

Terry Richardson

Sebastiao Salgado

Cindy Sherman

Joel Sternfeld

Mario Testino

Albert Watson

ON ROBERT FRANK

His work has always seemed to me to be a particularly personal view of the world and so it has remained particularly important to me. To **photograph** Robert's portrait was to preserve a record of a memorable conversation in New York. We shared a moment and now I share it with you.

—Steve Pyke

ON CINDY SHERMAN

Her "Untitled Film Stills" were among the most important and influential **photographs** of the last quarter century. I think in a very dramatic way they opened up a whole new way of thinking about art **photography** which was less concerned with the tradition and history of art **photography** and more concerned with the larger culture, with film and advertising. It's also an enormously personal work. I feel like the pictures operate on both a cultural and a deeply personal level.

—Gregory Crewdson

ON SEBASTIAO SALGADO

The first story we worked on together was in Portugal in 1975, one year after the coup d'etat. Even then you could tell he was full of devotion to his subject and operated with an intense vision. His determination was tremendous. I'm not even remotely surprised by the way he's been regarded. This is someone who had been an economist, and he came to **photography** later in life than other people. But when he decided to do it, he hit it with incredible intensity. And he's never lost that intensity.

—David Burnett

ON WILLIAM EGGLESTON

Eggleston's images are so simple, they almost defy description. He made **photographing** the everyday in color look very straightforward, and yet his images are very complex and subtle. What is interesting is that it takes a while to get it. When The Guide first came out, most people couldn't understand what all the fuss was about. Now, nearly 25 years later, his contribution and importance grow every year as people are slowly converted to his unique vision.

—Martin Parr

ON JAY MAISEL

One of the things that makes Jay so looked at and appreciated is the purity of his visual language combined with his gifts as an educator. He has an incredible ability to articulate his visual language, to explain what actually happens when the eye sees. He has a singular approach to what he does, and he's uncompromising in the way he looks at things. He has spent his whole life exploring that one area. There aren't a lot of **photographers** who have done that for so many years.

—Stephen Wilkes

IAC-CREATE-DATE: October 25, 2005

LOAD-DATE: October 26, 2005

FALL FASHION 2001 GUIDE

· 15 Fall Obsessions
From Baby Gap baubles to Dior cowboy boots

· A Tale of 8 Cities...
...and the hot fall looks you'll find in each

· The Muse
Glamorous rocker Chan Marshall is fashion's new It girl

· The Model
Shalom Harlow surfs onto the big screen

· The Photographer
The controversial photog behind Gucci has a knack for getting models to strip.

· The Store
Where can Extravaganza go to update its image? SoHo, of course.

STORE SEARCH

1500+ shops: shoes to sofas

GO!

By Type of Product
All

By Location
All

GO!

Shopping & Style

Sure Shot

Terry Richardson, the gangly, genial photographer from the Lower East Side known for his sexually provocative snapshots, has become a fashion power player. His secret weapon? An instamatic.

BY DAISY GARNETT

Terry Richardson is a 36-year-old with a handlebar mustache, long sideburns, and a collection of odd tattoos, including one on his belly that says "T-bone" and one on his heart that reads "SSA". He's tall and a bit bandy, and he's likely to be wearing faded jeans, Converse sneakers, and giant, slightly tinted aviator glasses. He's seventies-looking, not in a retro hipster way but in a Starsky & Hutch way, with a touch of Burt Reynolds thrown in for good measure. He's charismatic and famously attractive to women, despite his somewhat cartoonish demeanor. And much of the time, he carries a small snapshot camera with him, just like one you might take on holiday to record your adventures, which is more or less what he does for a living.

While most fashion photographers travel with a phalanx of good-looking young assistants wielding lights and oversized lenses, tripods, film bags, and reflectors, Richardson arrives on location with a couple of instant cameras, one in each hand, and nothing else. He doesn't design the lighting, doesn't plan his shoots, forgoes Polaroids, and never choreographs poses. He likes to work with little fuss and no entourage. And yet, in the last few years he has shot campaigns for Evian, Eres, H&M, Tommy Hilfiger,

EXH- 10

Anna Molinari, A|X, Sisley, and now —one of the biggest scores in the fashion world—the fall campaign for Gucci.

"You know how cameras are supposed to symbolize sexual power?" asks the creative director Nikko Amandonico, who has worked with Richardson since 1998 on the Sisley campaigns. "Well, Terry is a big man with a tiny camera. He looks funny. He makes jokes with his camera, and that's how he gets the shots."

Richardson has wielded his point-and-shoot on Faye Dunaway, Catherine Deneuve, Sharon Stone, the Spice Girls, and a great many famous models. His work has been exhibited in galleries in London, Paris, and New York, and he has been published in magazines as varied as French *Vogue*, *Harper's Bazaar*, *i-D*, *Vibe*, *The Face*, and the *Sports Illustrated* swimsuit issue.

"At the beginning," Richardson says, "people laughed at me because I was using snappies. Sometimes, a celebrity would look at my camera and go, 'Oh, I've got one of those.' I'd feel like handing it to them and saying, 'Well, you take the pictures then.' But I like using snapshot cameras because they're idiot-proof. I have bad eyesight, and I'm no good at focusing big cameras.

"Anyway," he continues, becoming more animated, "you can't give your photograph soul with technique. I want my photos to be fresh and urgent. A good photograph should be a call to arms. It should say, 'Fucking *now*. The time is ripe. *Come on*.' "

These days Richardson is enjoying what many in the fashion world call a moment. Designers and stylists are entranced by the way he gives a glossy fashion spread a palpable—and somewhat coarse—sexual punch. "He's a modern Helmut Newton," raves Emmanuelle Alt, the fashion director of French *Vogue*.

"We'd run the gamut of slick, finished photography," says Douglas Lloyd, the art director behind the Gucci campaigns, about the decision to use Richardson. "We wanted a rawer energy and more sex appeal, and that's what you find in Terry's work."

"Terry is very much about sex," says Gucci designer Tom Ford, "but what I love about his work is that his pictures jump off the page at you." In fact, Richardson has already been confirmed as the photographer of choice to shoot the next go-round for Gucci, which will feature Ford's spring 2002 collection.

This is what happened the day in June when Richardson received the news:

He spent the morning in his studio on the Bowery—a long space with a white shag pile carpet at one end, a workstation at the other, and a full-length mirror in between—catching up on phone calls and editing prints with his associate, Seth Goldfarb. Benedikt Taschen,

the iconoclastic art-book publisher, was in touch about the possibility of doing a book. *Harper's Bazaar* called about booking him to shoot a fashion story for Glenda Bailey's first official issue. Then Tom Ford called.

In the afternoon, a band named the Centuries came over to the loft. They were wearing gold and silver lamé outfits, and Richardson photographed them as part of a series he is doing for the French magazine *Self Service*. The early part of the evening he spent with Lenny Kravitz, discussing the next day's shoot, when Richardson would photograph Kravitz for his new record cover. Then he went to Sophie Dahl's rooftop party. At the party, a young stylist asked him if he was the son of Bob Richardson, the renowned sixties-era fashion photographer. "Yep," Richardson said, biting into a piece of mozzarella, "son of Bob."

"How is Bob?" asked the stylist. "He's well," said Terry, enjoying his supper. "Still working. Still wakes up with a hard-on every day. Pretty good for 74 years old." He demonstrated what he meant with a breadstick, took a snapshot of someone with his Contax, then told a story about a curious wet dream he had had only the night before.

Two days later, I watched as he packed his cameras and his suitcase for a trip to Paris, where he would visit his girlfriend, Camille Bidault-Waddington (a stylist who was named one of the world's most fashionable women by *Harper's Bazaar*), and shoot his next project, a couture story for French *Vogue*, with the model Angela Lindvall. Not too shabby, I remarked. "I know," he said, grinning. "I'll be like, 'Hello. *Hello*! Only me. *Bonjour*!' "

"I don't think Terry can believe his luck," says the British stylist Cathy Kasterine. "A lot of photographers become frustrated once they've shot a few big campaigns and done their fair share of fashion stories. They don't know what to say about fashion anymore. But not Terry. Every photograph for him is an adventure." She starts to laugh.

"Sorry," she says, "I was just thinking of how he looked when we first worked together. It was during his American-professor phase; he was wearing huge corduroy trousers and an English tweed jacket. This was in the bowels of Florida, at a nudist camp, where we were shooting an accessories story for *Nova* magazine. But that's Terry. He makes you laugh; his photographs make you laugh."

Still, much of the work Richardson is famous for is provocative and confrontational: a close-up of Richardson performing cunnilingus; a nude portrait of a bruised young woman crying on his bed; a close-up crotch shot of a woman wearing pink polyester underpants. One of his early assignments, a startling advertising campaign for the British designer Katherine Hamnett, captured a young woman staring at the camera with a frank, unashamed look. Her legs are open, showing a profusion of pubic hair. The photographs, after causing a stir in Britain, where they were published, provided Richardson with his first big break and foreshadowed the controversial "kiddie porn"

Calvin Klein campaign.

Read on...

Photo: Mary Ellen Mark

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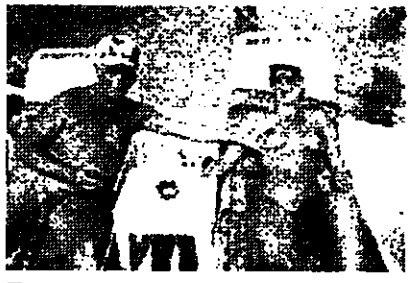
LA WEEKLY
OCT. 29 - NOV. 4, 2004

It's Terry's World and You're Just Afraid of It

The pride of Hollywood High makes good being bad

by Arty Nelson



Exsqueeze me: It's all good, clean, fleshy fun in Terry's world.

It's Thursday afternoon in Terry Richardson's studio on the Bowery in Lower Manhattan: Pantera's cranking, fashion models parade in and out, and judging by the staff's nonchalance, one suspects that this is just another day in Richardson's life, albeit with little of his recent and highly documented adventures in penetration and pearl necklaces. These days, it's good to be New York's favorite rail-thin, well-inked photo sniper. *Terryworld* (Taschen) and the limited-edition *Kibosh* (Damiani) were both recently released in conjunction with a savagely attended opening at the Zeitgeist-central Deitch Projects in Soho, during which thousands of rabid downtown kids gleefully braved a human stampede and near-inhuman temperatures for a glimpse of Mr. Richardson's latest photographic foray into a land where the photographer's own penis acts as a kind of sword/torch guiding him through the sometimes troubling and oftentimes hilarious wilderness of his unrepentant sexual psyche.

Today, however, it's all about casting for the next Sisley campaign, Richardson's 14th to date, although, in fact, he's playing hooky. Rocking his notorious standard-issue nerd glasses and muttonchops, he clowns with his buddy and fellow photographer Kenneth Capello, whom Richardson is shooting for *I.D.* magazine's special New York City issue. Watching one of the most sought-after image-makers in fashion and pop culture work is a study in frantic energy. He bops to the pounding metal, bonds with his subject, playfully does whatever he can to coax that one flash that will capture the deeper currents stirring behind the human mask.

Terry Richardson first busted onto the fine-art scene in 1998 with a show at the seminal Alleged Gallery in New York titled "These Colors Don't Run," which coincided with the publication of his first book, *Hysteric Glamour.* "There was a huge, 4-foot-by-6-foot portrait of Terry with cum all over his face, and then in the back there was a shot of a toothbrush jammed in a butt that was blown up to 12 feet by 30 feet," says Alleged's erstwhile maestro, Aaron Rose. "The thing about Terry that you have to remember is that he's got a total *Beavis and Butt-head* sense of humor. The first time I saw the work, Terry spread like hundreds of 8-inch-by-10-inches out on his kitchen table. Ten years of shooting people being wild on the Lower East Side. I couldn't believe how vast it all was. Terry creates the 'kids being bad' feeling as well as anyone who's ever mined that particular terrain."

Like Ed van der Elsken, Larry Clark and Nan Goldin, Richardson is obsessed with creating a body of work that captures the rarefied world inhabited by his peers and cohorts — an ongoing series of intimate but not precious portraits of urban life gone completely amok, the amalgam

EXH - 11

of which constitutes an impromptu autobiography. Whether it's sloppy lovers in party costumes French-kissing and slurping at each other's nipples, heavy metal kids rolling around in the grass, or fun and games at nudist colonies, what separates Richardson from the photographers who have preceded him in this genre is his terminally randy irreverence. Where the others call it quits at "aftermath," Richardson literally serves up the after-poop, or the jism as it streams across the cheek and breasts. Richardson is forever in search of the outlandish, never wavers when confronted with bad taste, and often quite remarkably manages to convey a sense of joy, exhilaration and sometimes even sheer poetry.

"It's hard to compare Terry to other current artists because almost everyone working in the same genre is copying him," says Dian Hanson, Richardson's editor at Taschen. "Terry is the innovator, the father of fashion-porn/porn-fashion, in perfect step with America's current 'reality' obsession, or rather America's current manipulated-reality obsession. Relevance? He's a guy using his charm and current cultural cool to rewrite a less-than-ideal adolescence. And more power to him. The guy excels in his fashion career and through sheer balls builds an equally admired side career casting himself in every man's porn fantasies. Most people would edit out these urges; Terry just bulls ahead."

Upon encountering the man and his subtly well-composed wild sides, here are a few things to bear in mind: Terry Richardson is the progeny of Bob Richardson, the '60s *Blowup*-era fashion photographer, and Annie Lomax, Bob's former wife and stylist. That makes for a colorful back story, but it also means that while many of us were watching *The Partridge Family* and then going to bed, Terry was more or less running wild in the streets. "Basically, I went from Paris and New York, and my dad being really successful to my dad totally losing his career and my mom being in a car accident which left her permanently brain-damaged," says Richardson. "Next thing you know, I'm losing my color TV and we're on food stamps and welfare. Literally, from the penthouse to the park bench." Richardson made his name and found fame in downtown New York but, in fact, spent much of his formative "punk rock youth" years in Hollywood — a Hollywood High Sheik who landed in New York with 800 bucks, a portfolio, a Pentax snapshot camera and three Black Flag cassettes. "To me, my best pictures happen when I capture the spirit of Black Flag's *Nervous Breakdown* EP. The years I spent at places like Cathay De Grande and the Starwood [seminal L.A. punk joints] were where I believe my aesthetic was formed," Terry smiles. "My tweaked Yale MFA, so to speak." Richardson keeps coffee in his cupboard by shooting fashion campaigns for the likes of Miu Miu, Gucci, YSL, APC and Tommy Hilfiger and, in his spare time, makes art photos that have recently begun featuring himself, fully engorged, engaging in a dazzling array of tantric maneuvers with a variety of willing partners.

"I used to always want to shoot nudes, but when I'd say to models, 'Hey, do you want to do this?' they'd be like, 'No way, why don't you get naked?' and I'd be like, 'Forget that.' Then I tried to get men involved in the process, but that was always weird, too. So then I got this idea that since I'd always got worked up and would, like, pop a boner when I was shooting women that maybe they'd get more into it if I let them start shooting me," says Richardson. "So now I've got all of these rolls of myself where I'm being ordered around by women while they take nudes of me, all of which turned out to really be the catalyst for this whole most recent body of work."

After sending a class he teaches to see the Deitch show, the art critic Jerry Saltz had this to report: "'Way politically incorrect' is right, but also maybe not. When we got to the Richardson show, which could be called '400 Blows' because, as you probably know, it's all-blowjobs-all-

the-time, the boys dutifully all said it was 'sexist' and 'bad' while, at first, the girls sat back. Then they all started carrying on about how it looked fun: 'Big dicks, blowjobs, cum on your tits.' They were all delighted."

The show clearly presents Richardson as a crafter of moods. "It's really almost like what I'm doing is 'happenings' more so than photo shoots." And more and more, especially with the *Kibosh* sessions, the actual snapper has, at times, become an almost secondary concern.

"The goal is to get the best image possible, and if that means that somebody standing off to the side gets a more candid shot than me, then I'm all for it," Richardson laughs. "Which doesn't always make my clients happy if I'm working on a job, but the way I see it, it really doesn't matter who is actually pressing the shutter, because they're my images. It's a picture that I've created. I don't work off lights and angles; I work off emotions. A mood that I create."

Ever since he's inserted himself as a predominant aspect of the subject matter, Richardson's work has taken on a more conceptual bent, a kind of post-studio photo analogy to the likes of Jeff Koons, Takashi Murakami or Maurizio Cattelan. Richardson's recent hardbound offerings, *Terryworld* and *Kibosh*, combine to form an extensive survey of his work to date. Taschen's *Terryworld* is the R-rated miniretrospective incorporating work from throughout Richardson's myriad chapters, including some of the tamer takes from the new erotic work. Taschen elected to pass on *Kibosh* as a book by itself. Explains Hanson: "What Benedikt Taschen wanted was an artful and complimentary mixture of Terry's fashion and candid work. What Terry wanted was to see himself boffing pretty girls in an art book. I was the referee. I had to keep pushing for more fashion and pulling the poop pictures out of the 'yes' pile each time Terry'd sneak them back in. In the end, I think we're all pretty happy and that the book really does represent most of Terry's complex and conflicting artistic nooks and crannies." As for the more X-rated *Kibosh*, the Italian publisher Damiani stepped up and put out a limited edition of 2,000 after Taschen passed on the project.

"The *Kibosh* work is really a result of me getting clean [off drugs] and really getting into the high that I was experiencing from the sex," says Richardson. "I mean, even one of the meanings of the title actually refers to me exorcising my inner demons and, hopefully, putting them to rest forever. To give it the 'kibosh' so to speak."

Is it porn? Or is it art? Who even really knows anymore? Where the lines aren't heavily blurred, they're dotted. When I tell Richardson that my wife, after approaching his work with more than a little apprehension, laughed out loud at several of his images, he breaks into a grin.

"You see, I love when I can get a smile out of someone with an image I've made. I'm interested in bringing a little joy into people's lives. Art doesn't have to be so serious; I think it's way more about moving people than needing to make them furrow their brows."

Terryworld *(Taschen) is available worldwide on October 29 wherever finer books are sold, including Taschen's flagship store in Beverly Hills. Kibosh (Damiani) is available at www.TerryRichardson.com.*

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TERRY RICHARDSON

TERRYWORLD

September 10 – October 2, 2004

76 Grand Street

On September 10th, 2004 today's greatest living photographer is going to show the world why he deserves the notorious moniker "God of Truth." Terry Richardson, the irreverent New Yorker who changed photography forever, will be showing his most personal work in years at Deitch Projects.

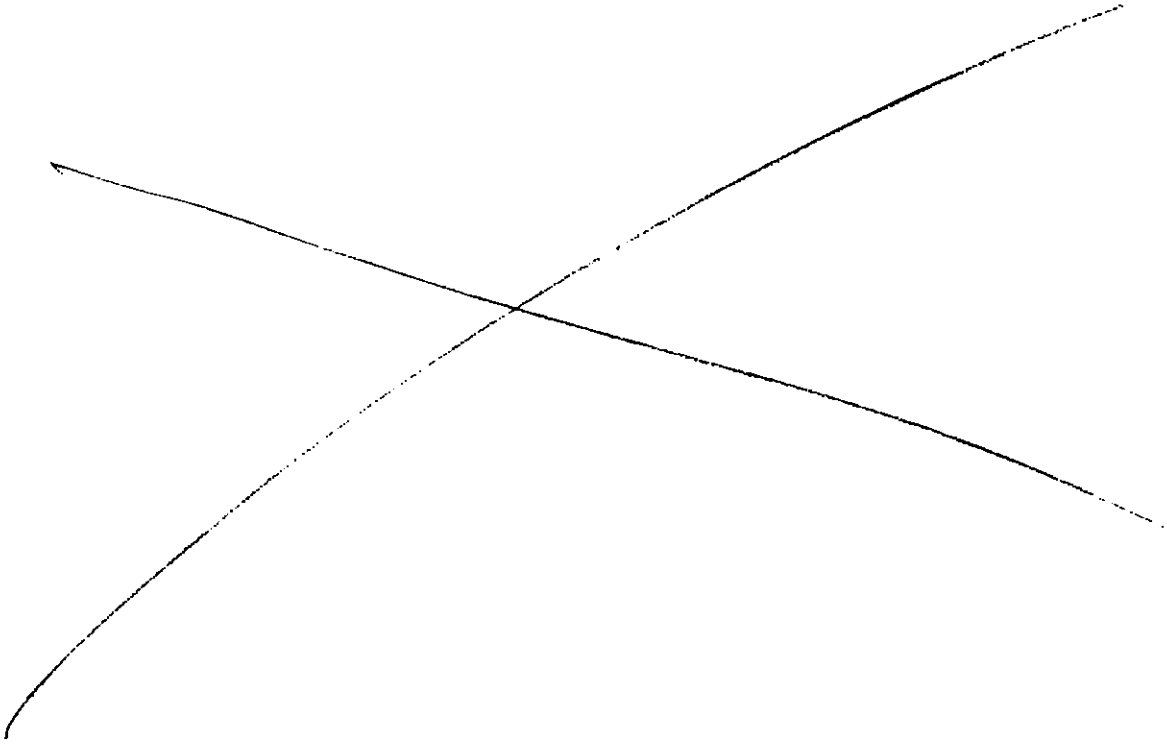
For those select few not familiar with Richardson's work it is an inimitable combination of low and high art. It is harsh and scary, lewd and erotic, hilarious and beautiful but, most importantly it is loved and understood by everyone who sees it. New York street kids are taught to understand the monolithic beauty of a Japanese landscape while the Parisian intelligentsia are taught the intricate workings of getting high in Hollywood at seven in the morning. How can the most exclusionary European snobs understand the grit of American's alleys? For the same reason the worst junkies alive can wrap their minds around Terry's sensual portraits of celebrities. His photographs are the truth. There is no pretension, no premeditation and no agenda. Terry Richardson lives his life as a fearless sensualist and his camera is always in hand capturing every second of the journey. Everything is there, bare and untethered for all to see and if you are happy to be alive you cannot resist these depictions of our magnificent world

CONTINUED ON REVERSE

EXH - 12

gone mad. We see top models in their kitchen making a coffee with awful shorts on. We see the rich and famous cropped so close their age spots look like delicate watercolors. It's always real and it's always right. To put it simply, Richardson's depictions of his day to day are the most sincere and genuine images of the 21st Century.

Fans of Terry's work will be excited to hear that Richardson's forthcoming Deitch show soars past all his previous work. It is his most heartfelt and endearing work to date, a relentless onslaught of everything that makes his photos beautiful but with more passion and sincerity than ever before. Every person who sees this show will be forever altered because the "God of Truth" has surpassed himself and taken his relentlessly venerated genius to a new height of ecstasy. This is more than a tasteful art show about the beauty we all take for granted. It is the documentation of a miracle.



GALLERY HOURS 12-6, TUESDAY – SATURDAY
FOR ADDITIONAL INFORMATION CONTACT
SUZANNE GEISS AT 212-343-7300

IN CONTEMPORARY DESIGN

WRITTEN AND DESIGNED BY PLAZM

ROCKPORT

EXH-13

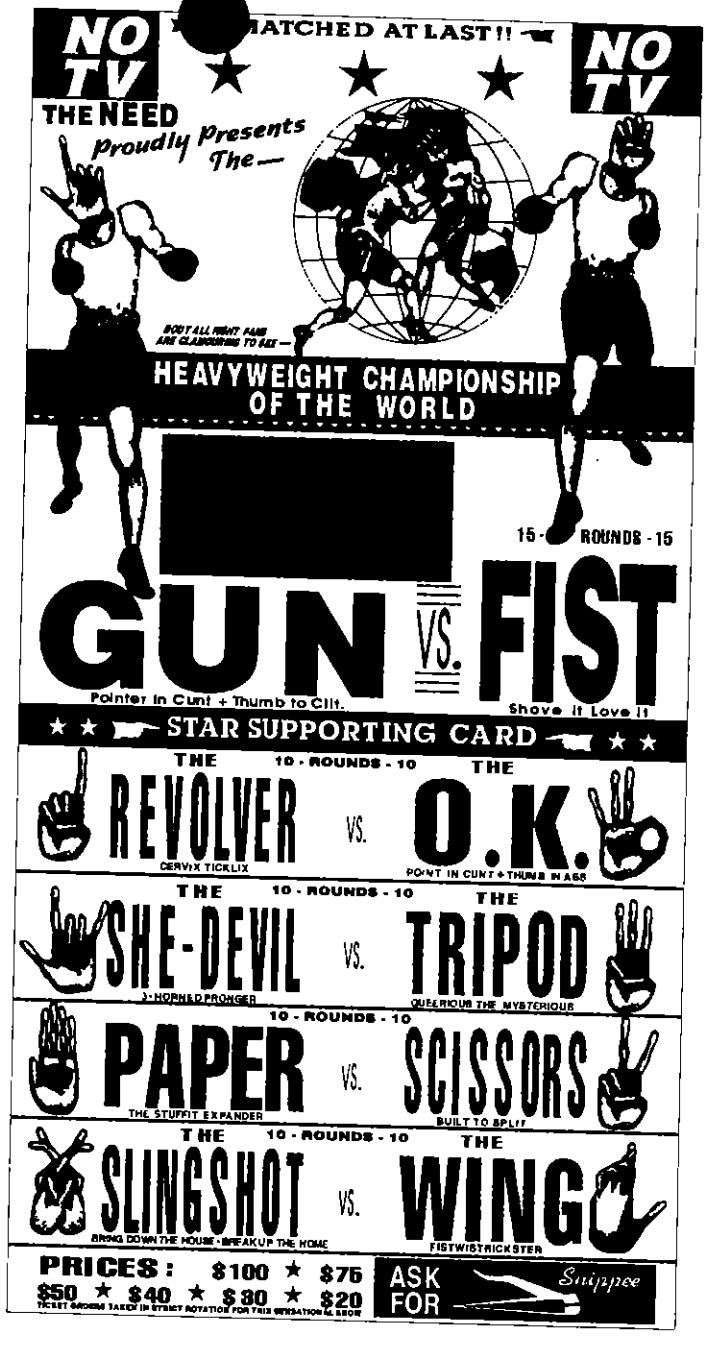

SISLEY

Photographer: Terry Richardson
Client: Sisley (Benetton Group)

Targeting both gay and straight consumers who appreciate femme-on-femme action, these Sisley ads come from a campaign that pushes the envelope of shock. Getting walked on, spanked, and having sex with animals all comprise the wide sexual appetites in these Sisley clothing advertisements—making cutting edge sex synonymous with cutting edge fashion.

TIE ME UP, TIE ME DOWN
PHOTOGRAPH BY TERRY RICHARDSON / STYLING BY NAIDÉE FINDLAY-LEVIN

2



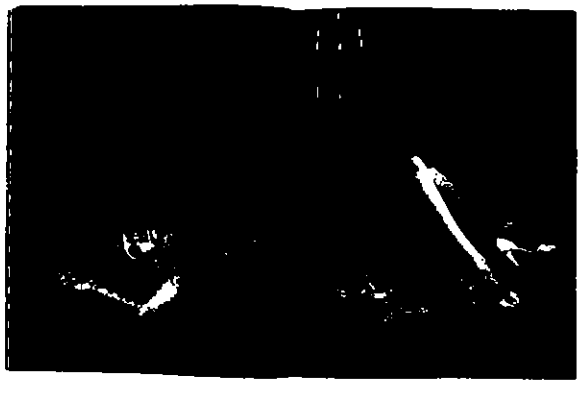
Title: *Spin* spread
Art Director/Designer: Markus Kuerzstan
Photographer: Terry Richardson
Client: *Spin* magazine

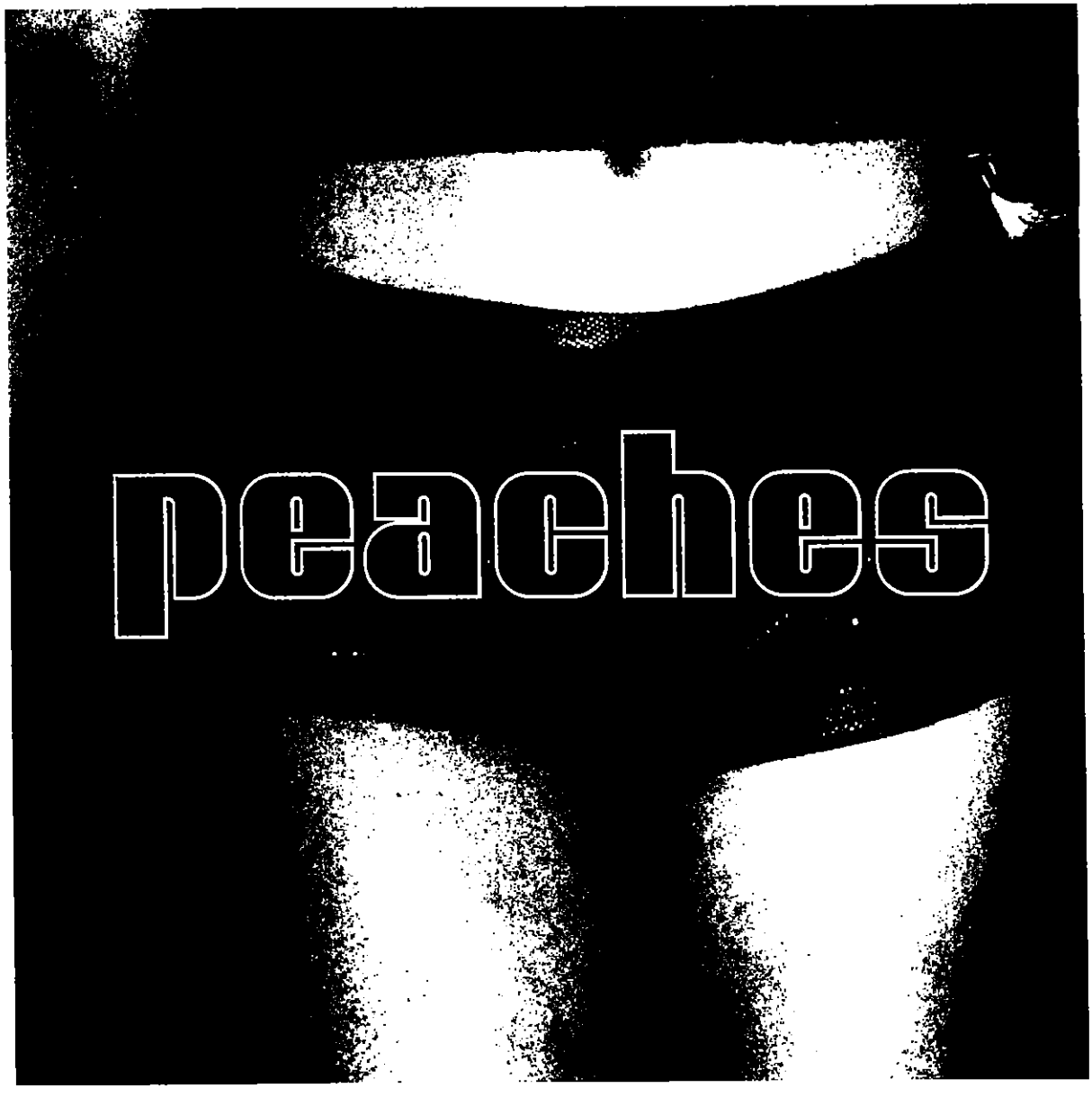
Skirting the edge between orgasm and death, these extreme bondage images display a level of explicitness generally avoided in mainstream design.

Title: Bloody Knuckle Sexxxing poster
Studio: Lux
Designer: Rachel Carns
Format: 23" x 48" (58 cm x 122 cm)
ammonia process blue print

Using the classic boxing poster as a model, Carns addresses sexuality not only as the axis of queer identity and connection but as an arena, private and public, where radical micropolitics are played out. Rather than use typical "sexual" imagery, Carns unhooks the viewer consciously from dominant points of sexual subjectification. Indicative rather than interpretive, she elevates the hand, a primary yet underrepresented sexual tool to fetish status.


The
Curse





Title: The Curse
Photographer: Terry Richadson
Styling: Andrew Richardson
Client: *Big* magazine 28

In a fashion story based on gothic-style fashion and horror narratives, these representations include much blood and fetish gear. From a thematic issue of the magazine based on horror, the generally low-brow form of entertainment—the horror movie—gets a new face in its use with high-brow fashion.

Title: *Teaches of Peaches* LP cover art
Design: Peaches
Additional Design: alorenz, Berlin
Photographer (front): Tyler Burke
Photographer (inside): Lisa Kannakko
Client: Kitty-yo Int (record label), Peaches (artist)

Peaches' music is provocative, mixing a lo-fi electronic dance sound with rapping and singing that generally does not stray from the subject of sex and rock 'n' roll (tracks have titles such as "Fuck the Pain Away" and "Lovertits"). These album images, culled by Peaches herself, give a good idea of her live performances, which often feature film, back-up dancers, striptease, and plenty of dirty dancing. It is a sonic and visual environment that turns a rock club into a sex club, a fantasy that ends when the show is over.

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Exh-15

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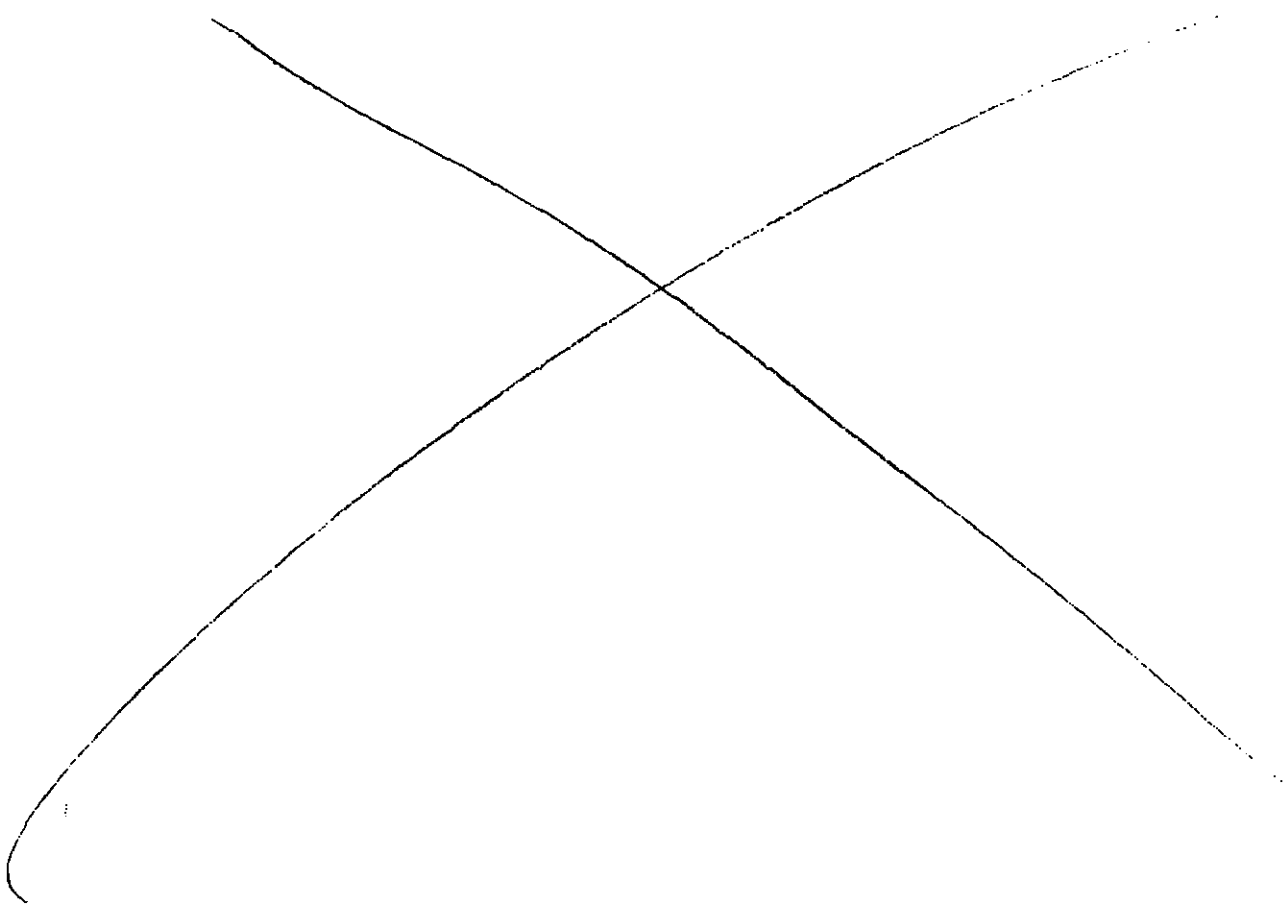

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3.	LOPERA, FRANK J	WINNETKA, CA 91306-3271 (11/2001 - Current) LOS ANGELES, CA 90046-2923 (07/1997 - 10/2000) KILLEEN, TX 76541 (06/1997 - 06/1997) CMR 4 APT		(CA: 1988) SSN was linked to more than 2 people.	(Age: 32) (Age: 32)

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Richardson may be considered the bad boy of fashion photography, but to many of us, he is simply a hero. His photos reflect the work of an artist, whose art speaks of the experience of his life, (and these days there is far too much posturing and pretension,) but with Terry Richardson you get the real deal. (A special "thank you" to the wonderful Dian Hanson for her heart-breaking and beautifully put together introduction which tells the story of how Terry Richardson became a fashion photographer, for Dian's editing on the book.)

The book itself is huge. It is like a kinky anvil. You want to leave it out for guests to be shocked at, awed by, and for them to giggle and blush at. (You'll want to keep it away from the kids though

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EXH-16

because it is naughty and very sexually explicit, thank god!)

What I love about Terry Richardson, (and I have been aware of his fashion and ad work for many years,) is that his intention isn't on shocking. That his images might shock some and are explicit is incidental. Richardson, son of famed fashion photographer, Bob Richardson, is a skilled photographer on his own and not concerned about how others digest his work as much as he is documenting the pleasure of life.

Terryworld is not just a sexy coffee table book designed to push the envelope, it's a big beautiful book that validates the art within by its own class and design.

Taschen, time and time again, supports the work of artists who might otherwise be shunned, and does so in a way to defy being classified as smut. Terryworld is as important a book today as Henry Miller's work was in its own day. We need adult material that challenges us and makes us laugh, cry and think. We need to question life and continue to evolve as a free thinking society. Terry

Richardson is a warrior of intellect and art, (whether he likes it or not.) Sure, there are miles of skin, erect penises, crotch shots, sexually charged acts and random moments of head scratching weirdness, but there is also an endless

Eon McKai's "Kill Girl Kill" is out! Read the review here!

What can I say about Petter Hegre that doesn't get said all the time? Mr. Hegre is not only a great photographer, but some might say he is one of the luckiest men on the planet His images are sexy, but undeniably artistic and visionary. There are few sites where I would actually pay to belong to but on this page, Hegre-Archives is one of two I couldn't liv without!

About Us:

stream of beauty and happiness in Richardson's work. Richardson, (who is as naked and on display as his subjects,) is a ringmaster and documenter of pleasure and joy. No one is harmed or violated in Terry Richardson's work. These are adults who share Richardson's whimsical lust for life and it shows, and it is beautiful and naughty all at once.

Sadly, the closed-minded and conservative would be quick to label Richardson's work as pornographic, but this would dismiss a great talent and sharp mind who has enhanced and elevated fashion. Terry Richardson, adored by fashion icons and celebrities, rock stars and models, is deserves respect as a photographer and an artist above all else. He is an inspiration and a visionary.

I have flipped through Terryworld over and over again, and with each time my smile has grown wider. Whether it is pictures of the lovely Kate Moss or Vincent Gallo in a Jesus guise or Terry Richardson naked photographing someone else, there is always a smile and if you pick this book up and display it proudly and freely to your consenting adult friends, you can have that same smile.

Terryworld is the perfect antidote for a stuffy, conservative, faux-moral society that might have forgotten how to have any fun at all. Life is too short not to live in Terryworld.

Terry Osterhout
February 2005

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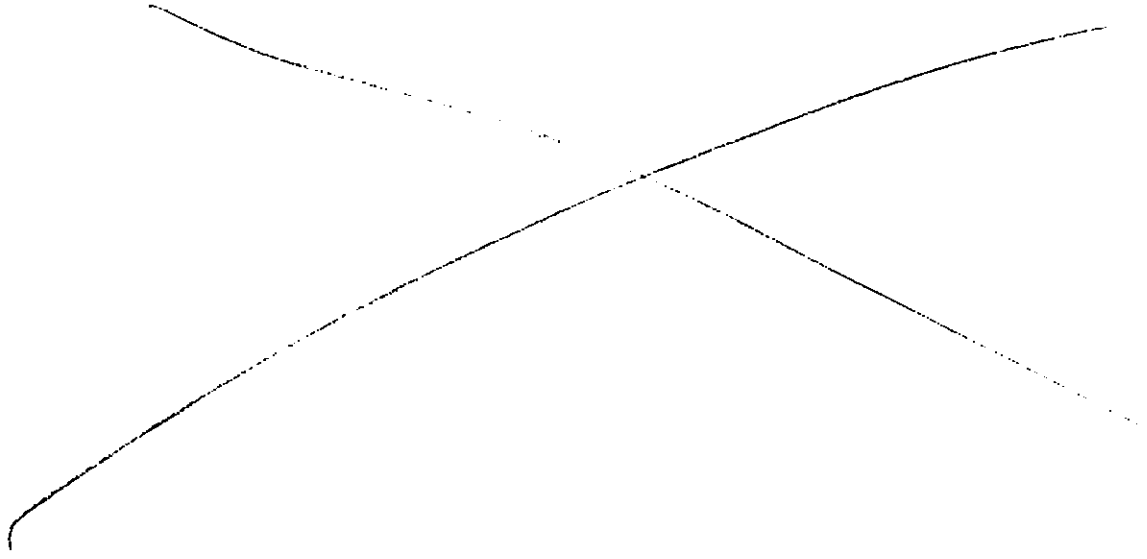

OUT OF STATE AUTHORITIES

*97 F.3d 689, *; 1996 U.S. App. LEXIS 26492, **

ROBERT BERY, JAMES ALBERT HARRIS, ANNE REISS, RICARDO ANTONIO PASCUAL, ARTISTS FOR CREATIVE EXPRESSION ON THE SIDEWALKS OF NEW YORK CITY, ROBERT LEDERMAN, JODI BOGUS, KNUT MASCO, ALEXIS PORTILLA and ARTHUR ROBINS, Plaintiffs-Appellants, vs. CITY OF NEW YORK; RUDOLPH GIULIANI, Mayor, City of New York; WILLIAM BRATTON, Chief, New York City Police Department; ROBERT MORGENTHAU, District Attorney-New York County; RICHARD A. BROWN, District Attorney-Queens County; WILLIAM L. MURPHY, District Attorney-Richmond County; CHARLES H. HYNES, District Attorney-Kings County; ROBERT F. JOHNSON, District Attorney-Bronx County; ALFRED C. CERULLO, III, Commissioner of New York City Department of Consumer Affairs; NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS; HENRY J. STERN, Commissioner, New York City Department of Parks & Recreation; MARILYN GELBER, Commissioner of the New York City Department of Environmental Protection of the City of New York; ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK and ANNE J. MCCARTHY, Executive Director of the Environmental Control Board of the City of New York, in her individual and official capacities, Defendants-Appellees.

Docket Nos. 95-9089 (L), 95-9131, 96-7137

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

97 F.3d 689; 1996 U.S. App. LEXIS 26492

April 26, 1996, Argued
October 10, 1996, Decided

SUBSEQUENT HISTORY: [1]**

Counsel Amended October 22, 1996. Certiorari Denied, June 2, 1997, Reported at: 1997 U.S. LEXIS 3407.

PRIOR HISTORY: Appeal from a judgment entered in the United States District Court for the Southern District of New York, Miriam Goldman Cedarbaum, Judge, denying motions to enjoin enforcement of the General Vendors Law, § 20-452 et seq. of the Administrative Code of the City of New York, on the grounds that the complained enforcement was prohibited by neither the First Amendment nor the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

DISPOSITION: Reversed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellants, visual artists and advocacy organization, challenged the judgment of the United States District Court for the Southern District of New York, which denied their motions to enjoin enforcement of the General Vendors Law, New York City, N.Y., Admin. Code § 20-452 et seq.

OVERVIEW: New York City restricted retail sales by non-food street vendors by issuing a limited number of licenses. The licenses were nearly impossible to obtain, and veterans and sellers of written materials were not subject to the cap. Appellants, artists and advocacy organization, sought an injunction barring enforcement of the law, New York, N.Y., Admin. Code § 20-452 et seq., and the trial court denied the motions. The court

reversed, holding that the law violated the artists' constitutional rights under U.S. Const. amends. I, XIV. The court held that artistic expression was protected speech, and that even if the regulation was content-neutral, it failed to be narrowly tailored to serve a significant government interest while leaving open alternative channels of communication. The court also held that requiring a license for non-written expression while not requiring a license for written expression violated the Equal Protection Clause.

OUTCOME: The court reversed the ruling of the trial court that denied the injunction sought by appellants, artists and advocacy organization, holding that the New York City General Vendors Law violated the First Amendment and the Equal Protection Clause of the United States Constitution.

CORE TERMS: license, First Amendment, street, visual, vendor, regulation, artist, ordinance, space, display, artwork, congestion, preliminary injunction, content-neutral, painting, vending, message, General Vendors Law, gallery, waiting list, expressive, channels, sidewalk, Fourteenth Amendment, artistic, speaker, written matter, advocacy, museum, fine

LexisNexis(R) Headnotes ♦ Hide Headnotes

Civil Procedure > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Appeals > Standards of Review

HN1 The appellate court reviews the district court's denial of appellants' preliminary injunction motions with an abuse of discretion standard. An abuse of discretion exists when the district court has made an error of law or of fact. When appellants seek vindication of rights protected under U.S. Const. amend. I, the court is required to make an independent examination of the record as a whole without deference to the factual findings of the trial court. Such a fresh examination of crucial facts is necessary even in the face of the clearly erroneous standard of factual review set forth in Fed. R. Civ. P. 52(a). More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Injunctions > Preliminary & Temporary Injunctions

HN2 In order to justify the award of a preliminary injunction, the moving party must first demonstrate that it is likely to suffer irreparable harm in the absence of the requested relief. Violations of U.S. Const. amend. I rights are commonly considered irreparable injuries for the purposes of a preliminary injunction. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Injunctions > Preliminary & Temporary Injunctions

HN3 Ordinarily, after showing irreparable injury, the movant then has two options: it must either demonstrate a likelihood of success on the merits or it must raise sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief. However, in a case in which the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Fundamental Freedoms > Freedom of Speech > Scope of Freedom

HN4 U.S. Const. amend. I shields more than political speech and verbal expression; its

protections extend to entertainment, film, theater, music, without regard to words, peaceful marches to express grievances to governmental authorities, sit-ins by blacks to protest racial discrimination, the wearing of black arm bands to evidence disapproval of the nation's involvement in Vietnam, the refusal to salute the flag as part of a regularized school activity, and parades with or without banners or written messages. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Fundamental Freedoms > Freedom of Speech > Scope of Freedom

HN5 The sale of protected materials is protected under U.S. Const. amend. I. More Like This Headnote

Constitutional Law > Fundamental Freedoms > Freedom of Speech > Scope of Freedom

HN6 Paintings, photographs, prints, and sculptures always communicate some idea or concept to those who view it, and as such are entitled to full U.S. Const. amend. I protection. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Fundamental Freedoms > Freedom of Speech > Scope of Freedom

HN7 In examining the constitutionality of a regulation that impinges on U.S. Const. amend. I activity, courts will apply a strict scrutiny analysis when the regulation discriminates on the basis of content, and a more lenient analysis to content-neutral regulations. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Fundamental Freedoms > Time, Place & Manner Restrictions

HN8 A content-neutral regulation may restrict the time, place, and manner of protected speech, provided it is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels for communication. More Like This Headnote | *Shepardize:* Restrict By Headnote

Governments > Local Governments > Licenses

Constitutional Law > Fundamental Freedoms > Freedom of Speech > Scope of Freedom

HN9 New York City's requirement in the General Vendors Law, New York City, N.Y., Admin Code § 20-452 et seq., that visual artists be licensed in order to sell their artwork in public spaces constitutes an unconstitutional infringement of their First Amendment rights. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: NOAH A. KINIGSTEIN, New York, NY for Bery Plaintiffs-Appellants.

WAYNE A. CROSS, New York, NY, (Randall M. Fox, New York, NY, Dewey Ballantine, New York, NY) for Lederman Plaintiffs-Appellants.

ELIZABETH I. FREEMAN, New York, NY, (Paul A. Crotty, New York, NY Corporation Counsel of the City of New York, Leonard Koerner, Robin Binder, Assistant Corporation Counsels) for Defendants-Appellees City of New York.

(Marjorie Heins, Arthur Eisenberg, New York, NY, for Amici Curiae American Civil Liberties Union, New York Civil Liberties Union, The New York Foundation for the Arts and The New York City Arts Coalition.)

(Gloria C. Phares, Geoffrey L. Thomas, Marc E. Kenny, Paul, Hastings, Janofsky & Walker, New York, NY, for Amici Curiae Chuck Close, Ronald Feldman, David Hammons, Hans Haacke, Jenny Holzer, Lucy Lippard, Claes Oldenberg, Irving Sandler, Simon Schama, Coosje Van Bruggen, The College Art Association, The Museaum of Modern Art and The Whitney Museum of American Art.)

(Shelly S. Freidman, Irving J. Gotbaum, Scott E. Goldsmith, Freedman & Gotbaum, New York, NY for Amici Curiae The fifth Avenue Association, Inc., The Alliance for Downtown New York, Inc., The Grand Central Partnership, Inc., The 34th Street Partnership, Inc., The Madison Avenue Business Improvement District and The Soho Alliance.)

JUDGES: Before: MAHONEY and VAN GRAAFEILAND, Circuit Judges, and CARTER, District Judge. n1 MAHONEY, Circuit Judge, concurring in the judgment and partly in the opinion of the Court.

n1 Honorable Robert L. Carter of the United States District Court for the Southern District of New York, sitting by designation.

OPINIONBY: ROBERT L. CARTER **[**2]**

OPINION:

[*691] CARTER, District Judge:

Appellants Robert Bery et al. (94 Civ. 4253) and Robert Lederman et al. (94 Civ. 7216), in separate actions below, sought by motions for a preliminary injunction to enjoin enforcement of the General Vendors Law, § 20-452 et seq. of the Administrative Code of the City of New York ("General Vendors Law"), which bars visual artists from exhibiting, selling or offering their work for sale in public places in New York City without first obtaining a general vendors license. Appellees City of New York and various municipal bodies and officials charged with administration and enforcement of the General Vendors Law ("the City") opposed the motions. The district court denied the motions; both sets of appellants appeal.

Background

Appellants are individual artists engaged in painting, photography and sculpture and an artists' advocacy organization, Artists for Creative Expression on the Sidewalks of New York. The individual artists have been arrested, threatened with arrest or harassed by law enforcement officials for attempting to display and sell their creations in public spaces in the City without a general vendors license. **[**3]** Some have had their art work confiscated and damaged. At least one asserts a desire to sell and display her art on the **[*692]** sidewalks of New York but has not done so for fear of arrest and destruction of her work.

The Bery appellants commenced their action on June 9, 1994, with the filing of a summons and complaint. The Lederman complaint was filed on October 5, 1994. Both sets of plaintiffs subsequently moved for a temporary restraining order and preliminary injunction. On October 24, 1995, the district court issued its memorandum and order jointly denying the motions for preliminary injunction in both actions, and on October 26, 1995, filed an amended opinion reported at 906 F. Supp. 163. By order of this court dated December 13, 1995, the actions were consolidated on appeal.

The General Vendors Law contains regulatory provisions concerning the sale or offering for sale of non-food goods and services in public spaces in the City of New York. Pursuant to § 20-452(b) of the Administrative Code of the City of New York ("Administrative Code"), a person who "hawks, peddles, sells, leases or offers to sell or lease, at retail, [non-food]

goods or services. . . in a public space" is a general **[**4]** vendor. Public space is defined as "all publicly owned property between the property lines on a street as such property lines are shown on the City Record including . . . a park, plaza, roadway, shoulder, tree space, sidewalk or parking space between such property lines. . . . [as well as] publicly owned or leased land, buildings, piers, wharfs, stadiums and terminals." Administrative Code § 20-452 (d).

At issue in the present case is § 20-453 of the General Vendors Law, a provision which initially required a license for all general vendors who sought to sell non-food goods or services in public spaces in the City. In 1982, Local Law 33 was enacted amending § 20-453 to exempt from the licensing requirement vendors of newspapers, books and other written matter. L.L. 33/1982. In enacting the amendment, the City Council described the new provision as consonant with the "principles of free speech and freedom of the press." Id. at § 1. In 1979, § 20-459(a) of the Administrative Code was amended by Local Law 50 to limit the total number of licenses in effect at any given time to the number of licenses in effect on September 1, 1979. L.L. 50/1979. The number at that time was 853. **[**5]** However, that limitation rests on a slippery slope, since any veteran who qualifies for a vending license must be issued one. New York State General Business Law § 32 (McKinney 1994). As of the present, 340 such licenses over and above the 853 cut-off number have been issued to veterans, making a total of 1,193 general vendors licenses in effect.

Violators of the licensing requirement are guilty of a misdemeanor punishable by fine and/or imprisonment and civil penalties. See Administrative Code § 20-472(a) and (c)(1). If criminally convicted, the violator is subject to a fine of not less than $ 250 nor more than $ 1000 and/or imprisonment of up to three months. Administrative Code § 20-472(a). If found civilly liable, the violator may be fined not less than $ 250 nor more than $ 1000, together with a fine of $ 250 for each day of the unlicensed activity. Administrative Code § 20-472(c)(1). In addition, police officers are authorized to seize the items being sold and the seized items are subject to forfeiture. Administrative Code §§ 20-468 and 20-472(a).

Administrative Code §§ 20-465(a), (b), (e), (f), (k), (m), (n), and (q) restrict the placement, location and size of vending **[**6]** displays and prohibit vending where an authorized city employee has given notice that exigent circumstances require the vendor to move. These regulations are applicable to all general vendors, including vendors of exclusively written matter. Vending, except for written matter, in a park is barred without written authorization from the Department of Parks and Recreation, Administrative Code § 20-465(j); it is also banned from certain commercial zoning districts and in a delineated section of midtown Manhattan. Administrative Code § 20-465(g).

District Court's Determination

The district court denied appellants' motions for preliminary injunctions, dealing with both motions in a joint decision issued in amended form on October 26, 1995. See Bery v. City of New York, 906 F. Supp. 163 (S.D.N.Y. 1995) (Cedarbaum, J.). The court **[*693]** ruled that the General Vendors Law was a content-neutral municipal ordinance of general application which violated neither the First nor the Fourteenth Amendment, although its incidental effect was to restrict the sale of art on the sidewalks of New York. The limitation of 853 licenses in effect at a given time, a waiting list of between 500 and 5,000 **[**7]** applicants, a waiting time of between 3-5 years to secure a license n2 and the absence of any of the appellants' names on the waiting list did not cause the court to modify this conclusion.

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n2 It is not clear whether this is the delay anticipated to receive a license or merely to be placed on the waiting list.

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Stating that "the precise nature of First Amendment protection for painting and sculpture with no verbal elements has not been addressed by the federal courts," the district court likened appellants' "fine art" to "applied or decorative art" and found that it rated only limited constitutional protection, in the absence of evidence of government censorship. The court found neither censorship nor animus towards artists as a motivation behind the enactment of the ordinance by the City Council. It thus deemed the ordinance content-neutral and subjected it to a more lenient level of scrutiny than would have been required had it been content-based. Id. at 168.

Applying the standard enunciated in United **[**8]** States v. O'Brien, 391 U.S. 367, 376-77, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968), the court found the provision furthered a public interest unrelated to the suppression of free speech that would be achieved less effectively absent the regulation. Id. The prohibition on the sale of art on the streets without a general vendors license, the court found, was appropriately designed to deal with the problem of street congestion. Id. The court did not address the question of whether alternative channels of expression remained open to appellants.

The court reasoned that words expressing "political or religious views are much closer to the heartland of First Amendment protection of 'speech' than the apolitical paintings in these cases." Id. at 169. Based on this premise, the court found the City's exemption of the sellers of written matter from the licensing requirement a rational determination consonant with the requisites of the Equal Protection Clause of the Fourteenth Amendment. Id. at 170. Thus, the court denied appellants' motions for a preliminary injunction on both First Amendment and Equal Protection grounds. Id.

Standards

HN1 This court reviews the district court's denial of appellants' **[**9]** preliminary injunction motions with an abuse of discretion standard. Reuters Ltd. v. United Press Int'l, Inc., 903 F.2d 904, 907 (2d Cir. 1990). "An abuse of discretion exists when the district court has made an error of law or of fact." Id. (citations omitted). In the present case, since appellants seek vindication of rights protected under the First Amendment, we are required to make an independent examination of the record as a whole without deference to the factual findings of the trial court. Bose Corp. v. Consumers Union of United States, 466 U.S. 485, 499, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984); Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, _ U.S. _ , 132 L. Ed. 2d 487, 115 S. Ct. 2338, 2344 (1995). Such a "fresh examination of crucial facts" is necessary even in the face of the "clearly erroneous" standard of factual review set forth in Rule 52(a), F.R. Civ. P. Hurley, 115 S. Ct. at 2344.

HN2 In order to justify the award of a preliminary injunction, the moving party must first demonstrate that it is likely to suffer irreparable harm in the absence of the requested relief. Sperry Int'l Trade, Inc. v. Government of Israel, 670 F.2d 8, 11 (2d Cir. 1982). Violations of First Amendment rights **[**10]** are commonly considered irreparable injuries for the purposes of a preliminary injunction. See, e.g., Elrod v. Burns, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976) ("the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); 11A Charles A. Wright, Arthur R. Miller **[*694]** and Mary Kane, Federal Practice and Procedure, § 2948.1 at 161 (2d ed. 1995) ("when an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary"). By the very nature of their allegations, then, appellants have met the first prong of the test.

HN3↑Ordinarily, the movant then has two options: it must either demonstrate a likelihood of success on the merits or it must raise "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Sperry Int'l Trade, Inc., 670 F.2d at 11, citing Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979) (per curiam). However, in a case in which "the moving party seeks to stay governmental action taken in the **[**11]** public interest pursuant to a statutory or regulatory scheme," the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard. Plaza Health Laboratories, Inc. v. Perales, 878 F.2d 577, 580 (2d Cir. 1989).

Discussion

I.

Initially, we note that the district court's view of the reach of the First Amendment is more restricted than the jurisprudence warrants. HN4↑The First Amendment shields more than political speech and verbal expression; its protections extend to entertainment, Winters v. New York, 333 U.S. 507, 510, 92 L. Ed. 840, 68 S. Ct. 665 (1948); film, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02, 96 L. Ed. 1098, 72 S. Ct. 777 (1952); theater, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975); music, without regard to words, Ward v. Rock Against Racism, 491 U.S. 781, 790, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989); peaceful marches to express grievances to governmental authorities, Gregory v. Chicago, 394 U.S. 111, 112, 22 L. Ed. 2d 134, 89 S. Ct. 946 (1969), Shuttlesworth v. Birmingham, 394 U.S. 147, 152, 22 L. Ed. 2d 162, 89 S. Ct. 935 (1969); sit-ins by blacks to protest racial discrimination, Brown v. Louisiana, 383 U.S. 131, 141-42, 15 L. Ed. 2d 637, 86 S. Ct. 719 (1966); the wearing of black arm bands to evidence disapproval of our involvement in Vietnam, **[**12]** Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 505, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969); the refusal to salute the flag as part of a regularized school activity, West Virginia State Board of Education v. Barnette, 319 U.S. 624, 632, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943); and most recently, parades with or without banners or written messages, Hurley, 115 S. Ct. at 2345. "The Constitution looks beyond written or spoken words as mediums of expression." Hurley, 115 S. Ct. at 2345. If the First Amendment reached only "expressions conveying a 'particularized message,'" its "protection would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schnberg, or Jabberwocky verse of Lewis Carroll." Id. at 2345 (quoting from Spence v. Washington, 418 U.S. 405, 411, 41 L. Ed. 2d 842, 94 S. Ct. 2727 (1974)(per curiam).

The First Amendment has surely been valued as essential to the preservation of a political democracy in this country; thus, even the pamphleteer espousing political sedition has been shielded from governmental suppression. See, e.g., Whitney v. California, 274 U.S. 357, 376, 71 L. Ed. 1095, 47 S. Ct. 641 (1927) (Brandeis, J., concurring) ("even advocacy of violation [of the law], however reprehensible morally, is **[**13]** not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on"). The First Amendment's fundamental purpose, however, is to protect all forms of peaceful expression in all of its myriad manifestations. Abood v. Detroit Board of Education, 431 U.S. 209, 231, 52 L. Ed. 2d 261, 97 S. Ct. 1782 (1977) ("it is no doubt true that a central purpose of the First Amendment '"was to protect the free discussion of governmental affairs."' (citations omitted). But our cases have never suggested that expression about philosophical, social, artistic, economic, literary **[*695]** or ethical matters . . . is not entitled to full First Amendment protection") (footnote omitted). See also Joseph Burstyn,Inc., 343 U.S. at 501 (motion pictures are fully protected expression that "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression").

The district court viewed the First Amendment's primary function as safeguarding the free flow of political and religious views, and hence felt sanguine about **[**14]** the ordinance's interference with appellants' "wish to sell their apolitical paintings." Bery, 906 F. Supp. at 170. The City apparently looks upon visual art as mere "merchandise" lacking in communicative concepts or ideas. Both the court and the City demonstrate an unduly restricted view of the First Amendment and of visual art itself. Such myopic vision not only overlooks case law central to First Amendment jurisprudence but fundamentally misperceives the essence of visual communication and artistic expression. Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection. n3 Indeed, written language is far more constricting because of its many variants--English, Japanese, Arabic, Hebrew, Wolof, n4 Guarani, n5 etc.--among and within each group and because some within each language group are illiterate and cannot comprehend their own written language. The ideas and concepts embodied in visual art have the power to transcend these language limitations and reach beyond a particular language group to both the educated and the illiterate. As the Supreme Court **[**15]** has reminded us, visual images are "a primitive but effective way of communicating ideas. . . a short cut from mind to mind." West Virginia State Board of Education, 319 U.S. at 632. Visual images and symbols, for example, are used in the Third World so that individuals who are unable to read may readily recognize the party or candidate they wish to vote for. One cannot look at Winslow Homer's paintings on the Civil War without seeing, in his depictions of the boredom and hardship of the individual soldier, expressions of anti-war sentiments, the idea that war is not heroic.

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n3 3 Serra v. U.S. General Services Admin., 847 F.2d 1045 (2d Cir. 1988) does not compel a different holding. In Serra, this court held that "artwork, like other non-verbal forms of expression, may under some circumstances constitute speech for First Amendment purposes." Id. at 1048. The court did not actually reach the question of the level of constitutional protection in artwork, however, since it found that "the First Amendment has only limited application in a case like the present one where the artistic expression belongs to the Government rather than a private individual." Id. **[**16]**

n4 4 A language written and spoken in the Senegambia region of West Africa.

n5 5 A language used by both indigenous and non-indigenous peoples in Paraguay.

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Furthermore, written and visual expression do not always allow for neat separation: words may form part of a work of art, and images may convey messages and stories. As appellants point out, Chinese characters are both narrative and pictorial representations. Nahuatl, a language used by Aztec peoples in Central America, also incorporates pictures in its written language. Visual artwork is as much an embodiment of the artist's expression as is a written text, and the two cannot always be readily distinguished.

The City argues that appellants' "expression" allegedly impinged by the Regulation is not in fact their art, but their peddling of the art. It argues that the sale of art is conduct, and in order to be constitutionally protected, the sale of protected material must be "inseparably intertwined with a 'particularized message.'" Young v. New York City Transit Authority, 903 F.2d 146, 153 (2d Cir.), quoting Spence, 418 U.S. at 410-11, **[**17]** cert. denied, 498 U.S.

984, 112 L. Ed. 2d 528, 111 S. Ct. 516 (1990). The City further argues that appellants are free to display their artwork publicly without a license, they simply cannot sell it.

These arguments must fail. HN5 The sale of protected materials is also protected. See Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 756 n.5 & 768, 108 S. Ct. 2138, **[*696]** 100 L. Ed. 2d 771 (1988). "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." Riley v. Nat'l Fed'n of Blind of North Carolina, 487 U.S. 781, 801, 101 L. Ed. 2d 669, 108 S. Ct. 2667 (1988). In United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995), the United States Supreme Court found that a ban on honoraria for government employees "imposes the kind of burden that abridges speech under the First Amendment," in part because "the denial of compensation for lower-paid, nonpolicymaking employees will inevitably diminish their expressive output" and will "impose[] a significant burden on the public's right to read and hear what the employees would otherwise have written and said." Id. at 1014-15. As in the present case, without the money, the plaintiffs **[**18]** would not have engaged in the protected expressive activity.

Furthermore, the street marketing is in fact a part of the message of appellants' art. As they note in their submissions to the court, they believe that art should be available to the public. Anyone, not just the wealthy, should be able to view it and to buy it. Artists are part of the "real" world; they struggle to make a living and interact with their environments. The sale of art in public places conveys these messages.

The district court seems to have equated the visual expression involved in these cases with the crafts of the jeweler, the potter and the silversmith who seek to sell their work. Bery, 906 F. Supp. at 167. While these objects may at times have expressive content, HN6 paintings, photographs, prints and sculptures, such as those appellants seek to display and sell in public areas of the City, always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection. Courts must determine what constitutes expression within the ambit of the First Amendment and what does not. This surely will prove difficult at times, but that difficulty does not warrant placing **[**19]** all visual expression in limbo outside the reach of the First Amendment's protective arm. Courts have struggled with such issues in the past; that is not to say that decisions are impossible. See, e.g., Dallas v. Stanglin, 490 U.S. 19, 24-25, 104 L. Ed. 2d 18, 109 S. Ct. 1591 (1989) (social dance distinguished from expressive dance); Yurkew v. Sinclair, 495 F. Supp. 1248, 1253 (D. Minn. 1980) ("wherever the amorphous line of demarcation exists between protected and unprotected conduct for First Amendment purposes, . . . tattooing falls on the unprotected side of the line"). Furthermore, simply because the matter does not lend itself to judicial determination does not mean that it is not appropriate for local lawmakers and governmental bodies such as the City to tackle. n6

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n6 6 The City proves itself ready to undertake the similarly difficult task of separating written from non-written materials. (See Aff. in Support of Cross-Motion for Summary J. at 2-3, reprinted in Joint Appendix at 196-97: e.g., baseball cards are written material, calendars and street maps are not.) There already exists in city ordinances a definition of "artist" that might serve as a helpful starting point: the New York Multiple Dwelling Law, Section 276 defines "artist" for the purpose of determining eligibility for living-work quarters earmarked for artists.

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II.

Having determined that appellants' artwork is entitled to full First Amendment protection, we turn now to an application of the appropriate constitutional test. HN7 In examining the constitutionality of a regulation that impinges on First Amendment activity, courts will apply a strict scrutiny analysis when the regulation discriminates on the basis of content, and a more lenient analysis to content-neutral regulations. Turner Broadcasting System, Inc. v. Federal Communications Comm'n, 512 U.S. 622, 114 S. Ct. 2445, 2469, 129 L. Ed. 2d 497 (1994).

The district court labelled the ordinance content-neutral, since it raised no concerns over censorship. It is not clear that this ordinance is content-neutral, however; it distinguishes between written and visual expression in a manner that effectively bans one while subjecting the other to a more limited form of regulation. See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 592-93, **[*697]** 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983) (law that "targets individual publications within the press" must surmount a heavy burden to satisfy First Amendment strictures); Buckley v. Valeo, 424 U.S. 1, 18, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976)(only regulations which do not **[**21]** discriminate among speakers or ideas are content-neutral). The ordinance's effective bar on the sale of artwork in public places raises concerns that an entire medium of expression is being lost. See, e.g., City of Ladue v. Gilleo, 512 U.S. 43, 129 L. Ed. 2d 36, 114 S. Ct. 2038 (1994); United States v. National Treasury Employees Union, 513 U.S. 454, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995). We need not decide that issue, however, since the ordinance must fall even under the less restrictive yardstick the court applied.

HN8 A content-neutral regulation may restrict the time, place, and manner of protected speech, provided it is "narrowly tailored to serve a significant governmental interest" and "leaves open ample alternative channels for communication." Ward, 491 U.S. at 791, quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984). The City certainly has a significant interest in keeping its public spaces safe and free of congestion. The license requirement as it relates to appellants, however, which effectively bars them from displaying or selling their art on the streets, is too sweeping to pass constitutional muster. See, e.g., Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429-30, **[**22]** 123 L. Ed. 2d 99, 113 S. Ct. 1505 (1993). The district court's failure to properly analyze the questions of narrow tailoring and alternative channels was an abuse of discretion that led to an incorrect result.

The ordinance is a de facto bar preventing visual artists from exhibiting and selling their art in public areas in New York. The total number of licenses outstanding at any given time is a low 853. Those fortunate enough to possess one of these permits may automatically renew it annually which, of course, means that late-comers like appellants have little hope of securing a license in the foreseeable future. In addition to this all-but-impenetrable barrier, a 500-to-5000 person waiting list makes appellants' prospects of securing a license apparently nonexistent, a fact conceded at oral argument. n7

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n7 7 Richard Schrader, former Commissioner of the City's Department of Consumer Affairs, the department which creates policy regarding licensing of general vendors, states that in an average year 15% of the 853 licenses become available due to previous holders' failure to renew, the only manner in which a license becomes available. (Joint Appendix at 221). In 1990 and in 1991, no licenses were available. In 1993, the discovery of a bookkeeping error revealed that 553 rather than 853 licenses were outstanding. The Department distributed 100 licenses to individuals on the waiting list and issued 200 more by lottery. This is the only occasion when licenses have been awarded in this manner. Aside from this, "no new licenses were issued in the past fifteen years," and based on Schrader's "extensive experience and knowledge," he has "never learned of an artist being licensed to sell art work." (Joint

Appendix at 221-223).

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The City may enforce narrowly designed restrictions as to where appellants may exhibit their works in order to keep the sidewalks free of congestion and to ensure free and safe public passage on the streets, but it cannot bar an entire category of expression to accomplish this accepted objective when more narrowly drawn regulations will suffice. The City points to nothing on this record concerning its need to ensure street safety and lack of congestion that would justify the imposition of the instant prohibitive interdiction barring the display and sale of visual art on the City streets. See Wright v. Chief of Transit Police, 558 F.2d 67, 68-69 (2d Cir. 1977) (city must find less restrictive alternative than complete ban on newspaper vending in subways); Loper v. New York City Police Dep't, 999 F.2d 699, 704-05 (2d Cir. 1993)(street begging constitutes expressive conduct which cannot be totally barred without unconstitutional interference with First Amendment rights.)

This is not to say that the display of large, cumbersome works that would block public traverse on the streets may not be subjected to discrete regulation as to time, place and location or indeed that both visual **[**24]** and written expression may not be so restricted by regulations addressed to particular areas of the City where public congestion might create **[*698]** physical hazards and public chaos. For example, requiring a license for a parade, Cox v. New Hampshire, 312 U.S. 569, 574, 85 L. Ed. 1049, 61 S. Ct. 762 (1941), or for a vending machine, City of Lakewood, 486 U.S. at 760, or restricting the right to distribute newspapers through newsracks on public property not traditionally a place for public communication, Gannett Satellite Information Network v. Metropolitan Transportation Authority, 745 F.2d 767, 772 (2d Cir. 1984), are all valid exercises of state police power to control time, place and manner of public access to public spaces.

The ordinance as it stands, however, cannot be considered merely a regulation designed for crowd management and control, or to prevent congestion or to keep the streets clear to allow unimpeded passage of the public over the City's thoroughfares. There exist specific sections of the Administrative Code which directly regulate time, place, manner and location of vending that already achieve these ends without such a drastic effect. See, e.g., Administrative Code § 20-465. Furthermore, **[**25]** the City's licensing exceptions for veterans and vendors of written material call into question the City's argument that the regulation is narrowly tailored. The City does not maintain control over the absolute number of vendors, since the exceptions are unlimited; the number 853 does not in and of itself control congestion. The City's control over congestion is largely maintained through the time, place and manner restrictions on vending that facilitate the flow of traffic, ease crowding and improve safety. n8

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n8 8 Even if the City were to adhere to a licensing system to regulate street art sales, there exist less intrusive means of issuing the licenses: one amicus suggests a rotating first-come, first-served lottery system for assigning a limited number of licenses. (Brf. amici curiae of the American Civil Liberties Union et al. at 26-27). The system employed by San Francisco might provide a model: certain areas are set aside for art sales and a weekly lottery assigns spots. (Joint Appendix at 313-14, 351). The district court made no mention of these potential alternatives.

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We turn now to a consideration of whether alternative channels of communication exist for appellants' protected expression. Appellants argue that no such alternatives exist. They contend that licenses are virtually impossible to obtain, and no other forum exists for the display of art by appellants, since museum and gallery space in New York City is drastically limited.

The City states that alternatives exist; appellants may sell their artwork from their homes or seek permission to display it in restaurants and street fairs and the like. However, appellants are entitled to a public forum for their expressive activities. Southeastern Promotions Ltd., 420 U.S. at 556 (1975); Gold Coast Pub., Inc. v. Corrigan, 798 F. Supp. 1558, 1572 (S.D. Fla. 1992), aff'd in part, rev'd in part on other grounds, 42 F.3d 1336 (11th Cir. 1994), cert. denied, __ U.S. __, 116 S. Ct. 337, 133 L. Ed. 2d 236 (1995). Displaying art on the street has a different expressive purpose than gallery or museum shows; it reaches people who might not choose to go into a gallery or museum or who might feel excluded or alienated from these forums. The public display and sale of artwork is a form of communication **[**27]** between the artist and the public not possible in the enclosed, separated spaces of galleries and museums.

Furthermore, to tell appellants that they are free to sell their work in galleries is no remedy for them. They might not be at a point in their careers in which they are interested in reaching the public that attends exhibits at art galleries--if, indeed, they could get their works accepted for showing. Appellants are interested in attracting and communicating with the man or woman on the street who may never have been to a gallery and indeed who might never have thought before of possessing a piece of art until induced to do so on seeing appellants' works. The sidewalks of the City must be available for appellants to reach their public audience. The City has thus failed to meet the requirement of demonstrating alternative channels for appellants' expression.

On the basis of this record before us, HN9↑ the City's requirement that appellants be licensed in order to sell their artwork in public spaces constitutes an unconstitutional infringement of their First Amendment rights. **[*699]** The district court abused its discretion in denying the preliminary injunction.

Finally, we note that the **[**28]** district court was similarly incorrect in its rejection of appellants' argument under the Equal Protection Clause of the Fourteenth Amendment. The requirement that appellants' art cannot be sold or distributed in public areas without a general vendors license, while written material may be sold and distributed without a license, must fall for the same reasons outlined above. Since the ordinance does impermissibly impinge on a fundamental right, the district court incorrectly dismissed the equal protection argument under a rational basis test.

Accordingly, the judgment of the district court is reversed.

CONCURBY: MAHONEY

CONCUR: MAHONEY, Circuit Judge, concurring in the judgment and partly in the opinion of the Court:

I concur in the judgment of the Court and in the opinion of the Court except for its discussion of the Equal Protection Clause of the Fourteenth Amendment.

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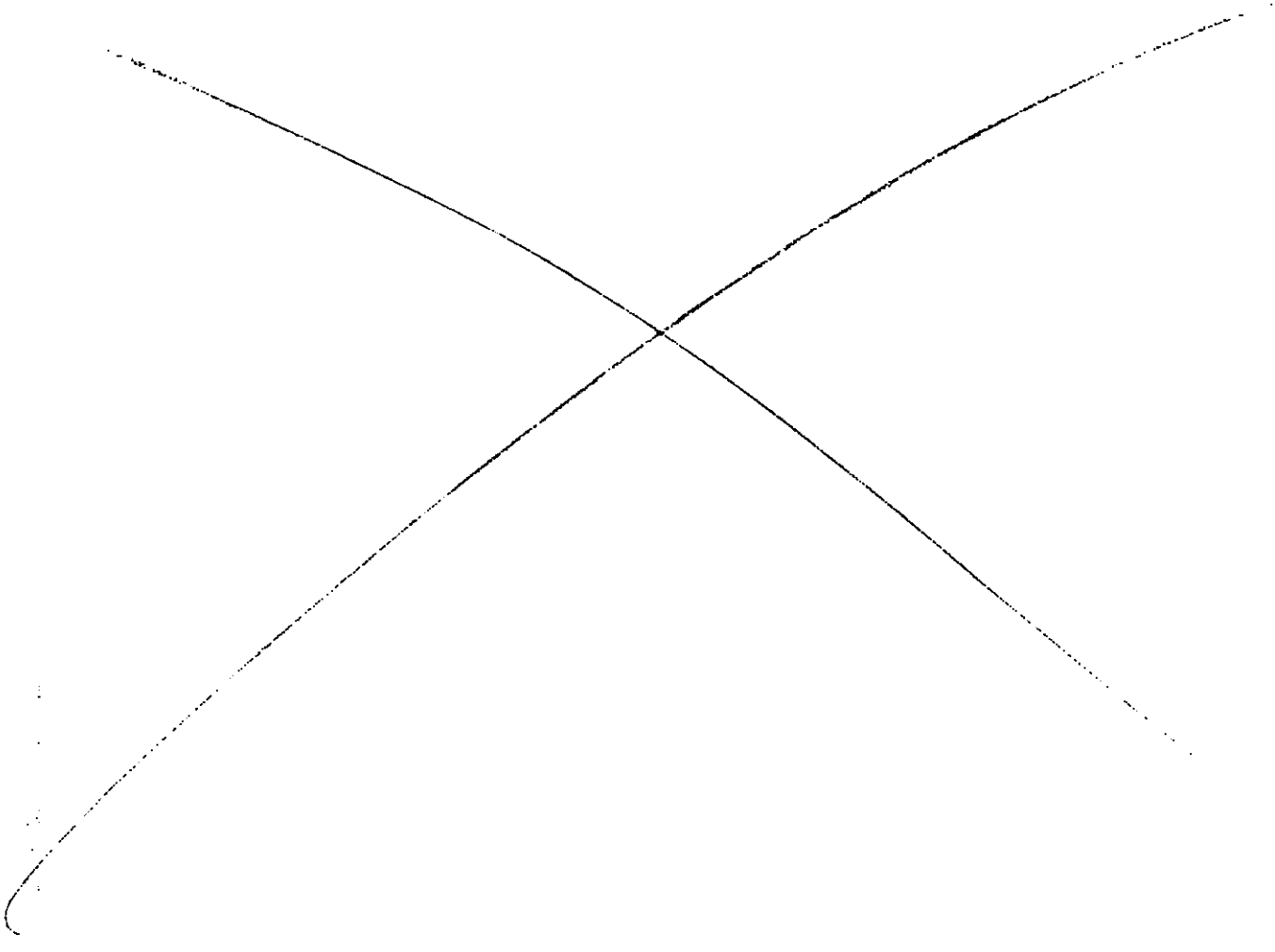


*115 A.D.2d 414, *; 496 N.Y.S.2d 219, **;*
*1985 N.Y. App. Div. LEXIS 54803, ***; 12 Media L. Rep. 1558*

Elizabeth **Creel** et al., Respondents, v. **Crown Publishers,** Inc., Appellant

[NO NUMBER IN ORIGINAL]

Supreme Court of New York, Appellate Division, First Department

115 A.D.2d 414; 496 N.Y.S.2d 219; 1985 N.Y. App. Div. LEXIS 54803; 12 Media L. Rep. 1558

December 17, 1985

CASE SUMMARY

PROCEDURAL POSTURE: In an action alleging in part violations of N.Y. Civ. Rights Law §§ 50, 51, defendant publisher appealed from an order of the Supreme Court, New York County (New York), which denied the publisher's motion for an order dismissing the complaint pursuant to N.Y. C.P.L.R. 3211(a)(7) and granted plaintiff photographed persons' cross motion for summary judgment on the issue of liability on the first and second causes of action in the complaint.

OVERVIEW: The photographed persons filed a complaint against the publisher alleging violations of N.Y. Civ. Rights Law §§ 50, 51 from the publication of a guide book on nude beaches, which book contained the photographed persons' picture. The photographed persons claimed that the publication of their picture was without their written consent. The court reversed the order denying the publisher's motion to dismiss and granting the photographed persons' summary judgment motion on the first two causes of action. Interpreting §§ 50, 51 narrowly, the court held that the photograph was not used for the purposes of trade within the meaning of the civil rights law because it was used to illustrate a guide book disseminating information concerning a matter of public interest, namely, nude beaches. In reaching its conclusion, the court noted that the focus of inquiry in applying the "public interest" exception was not only on the particular photograph but also on the book within which the photograph appeared.

OUTCOME: The court unanimously reversed, on the law, without costs, the order denying the publisher's motion to dismiss the civil rights complaint, granted such motion, and denied the photographed persons' cross motion for summary judgment on the first and second causes of action in the complaint.

CORE TERMS: picture, photograph, Civil Rights Law, public interest, written consent, beach, causes of action, summary judgment, purposes of trade, advertising, cross motion, utilized, nude, dissemination, newsworthy, portrait

LexisNexis(R) Headnotes ◆ Hide Headnotes

Torts > Defamation & Invasion of Privacy > Appropriation & Right of Publicity

HN1 N.Y. Civ. Rights Law §§50, 51, read (§ 50 in whole, § 51 in part): A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.Any person whose name, portrait or picture is used within New York for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court.A picture illustrating an article on a matter of public interest is not considered used for the purpose of trade or advertising within the prohibition of the statute unless it has no real relationship to the article or unless the article is an advertisement in disguise. More Like This Headnote | *Shepardize:* Restrict By Headnote

JUDGES: [*1]**

Concur -- Kupferman, J. P., Sandler, Asch, Bloom and Rosenberger, JJ.

OPINION: [*414] [219]** Order of the Supreme Court, New York County (Edward J. Greenfield, J.), entered January 29, 1985, which, *inter alia*, denied defendant's motion for an order dismissing the complaint pursuant to CPLR 3211 (a) (7) and granted plaintiffs' cross motion for summary judgment on the issue of liability on the first and second causes of action in the complaint, is unanimously reversed, on the law, without costs, the motion by defendant granted and plaintiff's cross motion denied.

This action arises out of defendant's publication in 1983 of a book, "World Guide to Nude Beaches and Recreation," in which a picture of the plaintiffs appeared on one page. Plaintiffs allege in the complaint that the publication of their picture was without their written consent, asserting various causes of action.

The author, Lex Baxandall, stated that he was President of Naturalists, Inc., which promoted a movement encouraging a **[**220]** more healthy and natural perception of the human body. In the 1980's, he saw the "naturalist beach" phenomenon as worldwide. The guide here was to document and interpret **[***2]** the movement, with a listing of nude beaches around the world. The textual material was interspersed with pictures, including the plaintiffs' photograph.

The photographer, Ronald Snipe, swore in an affidavit that, in July 1982, he was vacationing on the island of St. Maarten in the Caribbean; that he met the plaintiffs and visited a beach there; and, with their oral consent, took pictures for the Baxandall publication. Apparently, this picture of plaintiffs which appeared in the book was just one of approximately 100 photos taken by him of them at that time.

Defendant **Crown Publishers,** Inc., moved for dismissal of the complaint pursuant to CPLR 3211 (a) (7) and the plaintiffs cross-moved for summary judgment on liability with respect to **[*415]** the first two causes of action, which claimed a violation of Civil Rights Law §§ 50 and 51.

Special Term granted the plaintiffs summary judgment as to liability, with a later assessment of damages. It found that the publication of the photographs was for purposes of trade within the Civil Rights Law and rejected any claim that such pictures were "newsworthy." It saw the primary purpose of the book as one to print 200 pictures of totally **[***3]** exposed persons, and not the dissemination of any information. In Special Term's view, the photograph's use was designed to promote the commercial sales of the defendant's book, and hence violated the Civil Rights Law. We disagree and reverse.

The photograph at issue, if within the Civil Rights Law, requires written consent by the

person depicted before any trade or business use. The statutory provisions, HN1 Civil Rights Law §§ 50 and 51, read (§ 50 in whole, § 51 in pertinent part):

"§ 50. Right of privacy.

"A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

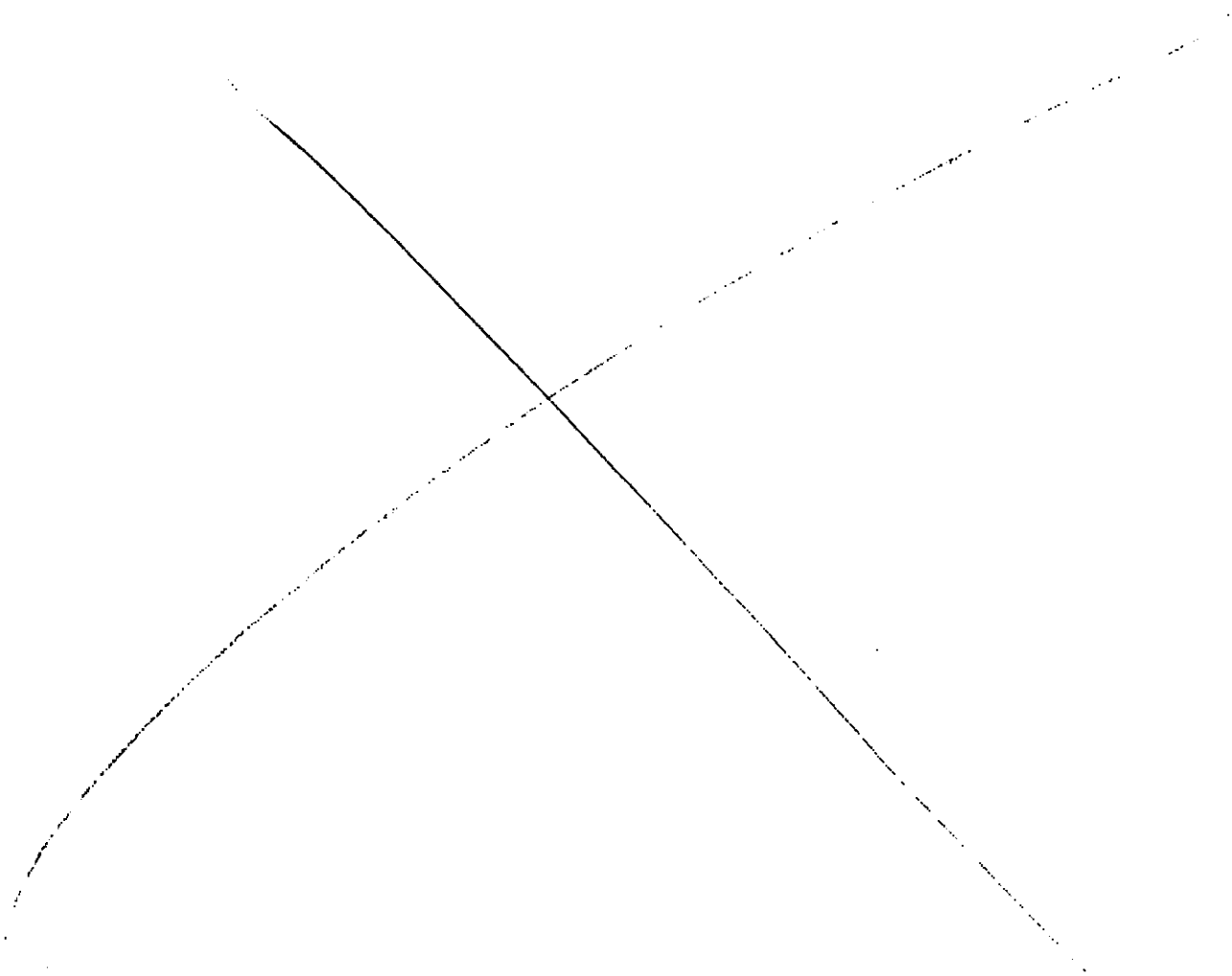
"§ 51. Action for injunction and for damages.

"Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court".

It is well settled that "[a] picture illustrating an article on a matter of public interest is not **[***4]** considered used for the purpose of trade or advertising within the prohibition of the statute * * * unless it has no real relationship to the article * * * or unless the article is an advertisement in disguise." (*Dallesandro v Holt & Co.*, 4 AD2d 470, 471, *appeal dismissed* 7 NY2d 735, citations omitted.)

The courts have always interpreted sections 50 and 51 narrowly so as not to apply to publications concerning newsworthy events or matters of public interest (*Stephano v News Group Pub.*, 64 NY2d 174, 184). This stems not only from a desire to give effect to the legislative intent behind the statute but also "reflects Federal and State constitutional concerns for free dissemination of news and other matters of interest to the public" *(id.)*.

A guide to beaches where nude bathing is permitted is a matter of some public interest and the use of photographs **[*416]** with the text is protected by constitutional safeguards and is outside the protection of the Civil Rights Law. The focus of inquiry in applying the "public interest" exception is not only upon the particular photograph but also upon the article or book within which the photograph appears. Here, the photograph **[***5]** was utilized to illustrate a guide book which disseminated information concerning a matter of public interest and was not, therefore, utilized for purposes of "trade" within the meaning of the Civil Rights Law. That plaintiffs may deem the **[**221]** use of the photograph "offensive" cannot vitiate its use once the finding has been made that such use is outside the scope of sections 50 and 51 *(see, Arrington v New York Times Co.*, 55 NY2d 433; *Murray v New York Mag. Co.*, 27 NY2d 406).



*169 Misc. 2d 500, *; 645 N.Y.S.2d 707, **;*
*1996 N.Y. Misc. LEXIS 205, ****

Doreen Gaeta, Plaintiff, v. Home Box Office et al., Defendants.

96-295

CIVIL COURT OF THE CITY OF NEW YORK, NEW YORK COUNTY

169 Misc. 2d 500; 645 N.Y.S.2d 707; 1996 N.Y. Misc. LEXIS 205

April 15, 1996, Decided

NOTICE: [*1]**

EDITED FOR PUBLICATION

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff spectator filed an action against defendant television movie network and defendant photographer in the Civil Court of the City of New York, New York County (New York) asserting a privacy claim under N.Y. Civ. Rights Law §§ 50, 51 and a defamation claim. The television movie network and the photographer filed a motion for summary judgment.

OVERVIEW: The spectator came upon a crowd of people and stopped to see why they had gathered. The photographer was taking pictures of nude models, and a cameraman for the television movie network was getting footage of the public's response to public nudity. The spectator later learned that her picture appeared in a television segment on the subject of public nudity. She claimed that the unauthorized use of her picture in the segment violated her rights under N.Y. Civ. Rights Law §§ 50, 51 and constituted defamation. The court held that the television movie network and the photographer were entitled to judgment on the privacy claim and that the photographer was entitled to judgment on the defamation claim. In so holding, the court found that (1) the television segment concerned a matter of public interest; (2) the spectator's picture was not used for purposes of trade; (3) the picture bore a real relationship to the subject matter of the segment; (4) the photographer did not play a role in the production or distribution of the segment; and (5) the television movie network failed to cite legal authority bearing on whether the segment was subject to a defamatory interpretation.

OUTCOME: The court granted the motion for summary judgment with respect to the privacy claim and with respect to the defamation claim against the photographer, but denied without prejudice the television movie network's motion for summary judgment with respect to the defamation claim.

CORE TERMS: picture, crowd, defamation, scene, segment, cause of action, unauthorized use, public interest, false light, nude, newsworthy, photograph, nudity, photographed, newsworthiness, naked, defamation claim, Civil Rights Law, purposes of trade, subject matter, photographer, spontaneous, common-law, editorial, concert, pleaded, close-up,

expectation of privacy, right to privacy, advertising

LexisNexis(R) Headnotes • Hide Headnotes

Torts > Defamation & Invasion of Privacy > Appropriation & Right of Publicity

HN1 New York does not recognize a common-law right to privacy. Judicial relief for privacy claims is available solely under N.Y. Civ. Rights Law §§ 50, 51, which provide a right of action only for use of a person's name or picture for advertising or trade purposes without prior written consent. More Like This Headnote

Torts > Defamation & Invasion of Privacy > Appropriation & Right of Publicity

HN2 The terms "advertising" or "trade purposes" should not be construed to apply to publications concerning newsworthy events or matters of public interest. The term "public interest" has been liberally applied or freely defined, in recognition of federal and state constitutional concerns for free dissemination of news and other matters of interest to the public. The newsworthiness or public interest exception has been held to apply not only to hard news such as reports of political happenings, but also to social trends and matters of interest to consumers. The exception thus encompasses spontaneous coverage of events in progress, as well as planned coverage of human interest stories. Newspapers publish articles which are neither strictly news items nor strictly fictional in character. They are not the responses to an event of peculiarly immediate interest but, though based on fact, are used to satisfy an ever-present educational need. As a general rule, such cases are not within the purview of N.Y. Civ. Rights Law §§ 50, 51. More Like This Headnote

Torts > Defamation & Invasion of Privacy > Appropriation & Right of Publicity

HN3 The newsworthiness exception to N.Y. Civ. Rights Law §§ 50, 51 has been extended to "communications media," in the broadest sense of that term (for example, the magazine, newspaper, radio and television, motion picture and poster industries). More Like This Headnote

Torts > Defamation & Invasion of Privacy > Appropriation & Right of Publicity

HN4 A narrow scope of review has been adopted in evaluating editorial judgments as to what constitutes a matter of genuine public interest for purposes of N.Y. Civ. Rights Law §§ 50, 51. As questions of newsworthiness are better left to reasonable editorial judgment and discretion, judicial intervention should occur only in those instances where there is no real relationship between a photograph and an article or where the article is an advertisement in disguise. More Like This Headnote

Torts > Defamation & Invasion of Privacy > Appropriation & Right of Publicity

HN5 A picture illustrating an article on a matter of public interest is not considered used for the purposes of trade or advertising unless it has no real relationship to the article or unless the article is an advertisement in disguise. The fact that a publication is produced for profit or even that a picture is included in the publication for the purpose of increasing profits does not constitute a use for trade; as most publications of newsworthy information operate on a for-profit basis, a contrary rule would effectively eliminate their exemption from the statute. More Like This Headnote

Torts > Defamation & Invasion of Privacy > Appropriation & Right of Publicity

HN6 The unauthorized use of an individual's picture to illustrate an article is permitted, even where the individual was not on the scene of or did not personally participate in the events depicted in the article, so long as the article concerns a matter of public interest, and the picture bears a real relationship to the subject matter of the article. More Like This Headnote

Civil Procedure > Pleading & Practice > Pleadings

Torts > Defamation & Invasion of Privacy

HN7 An endorsement pleading need only set forth the nature and substance of the cause of action. It need not comply with the requirement of N.Y. C.P.L.R. 3013 applicable to formal pleadings generally, or with the requirements of N.Y. C.P.L.R. 3016 regarding particular allegations to be pleaded in specific actions, including actions for defamation. More Like This Headnote | *Shepardize:* Restrict By Headnote

◆ Hide Headnotes / Syllabus

HEADNOTES: Civil Rights - Commercial Use of Photograph - Unauthorized Use of Plaintiff's Picture on Cable Television Program The unauthorized use of plaintiff's picture on defendant's cable television program called "Real:Sex" as part of a spontaneous crowd scene observing a professional photographer take pictures of models posing naked on a New York City street and in a closeup reaction shot shown in the introduction to the program is not actionable as an invasion of privacy under Civil Rights Law §§ 50 and 51, which prohibit only the commercial appropriation of a person's name or image. The program in which plaintiff was pictured concerned a matter of public interest, the public's response to public nudity, and, thus, does not fall within the purview of the Civil Rights Law. Nor can plaintiff's picture be deemed to have been used for purposes of trade. Plaintiff's picture as part of the crowd viewing the photographing of nude models bears a direct relationship to the newsworthy subject matter of the program and the use of her image in both contexts was therefore permissible. Furthermore, since plaintiff voluntarily joined the crowd and since a newsworthy incident affecting the crowd was taking place, her expectation of privacy was or should have been limited.

Pleading - Sufficiency of Pleading - Libel and Slander Plaintiff states a cause of action for defamation based upon the unauthorized use of her picture on defendant's cable television program called "Real:Sex" as part of a spontaneous crowd scene observing a professional photographer taking pictures of models posing naked on a New York City street and in a closeup reaction shot shown in the introduction to the program. Although plaintiff withdrew the alleged common-law tort claim, not recognized in New York, that her appearance in the video placed her in a "false light", the complaint as originally pleaded amplified by the bill of particulars, adequately alleges that the program defamed plaintiff by suggesting that she willingly took part in sexually explicit programming. Moreover, the rules applicable to formal pleadings in Supreme Court (*see,* CPLR 3013, 3016) are not applicable to the endorsement pleadings permitted in the New York City Civil Court which need only set forth "the nature and substance of the cause of action." (CCA 902 [a] [1].) Since neither party addressed the issue of whether the program is subject to a defamatory interpretation, defendant's motion to dismiss the defamation cause of action must be denied without prejudice to renewal on proper papers.

COUNSEL:

Solovay Marshall & Edlin, P. C., New York City, for defendants. *Howard Gotbetter,* New York City, for plaintiff.

JUDGES: MARCY FRIEDMAN, J.C.C.

OPINIONBY: MARCY FRIEDMAN

OPINION: [*501]

[708]** Marcy Friedman, J.

In this action, plaintiff sues defendants Home Box Office, Division of Time-Warner Entertainment Co., L.P. (HBO) and Spencer Tunick for damages arising out of an HBO broadcast. The endorsed complaint alleges a claim for violation of plaintiff's right to privacy under Civil Rights Law §§ 50 and 51, and a separate claim for defamation. Defendants move for summary judgment dismissing the complaint.

The relevant facts are not in dispute: HBO telecast a program called "Real:Sex" in which plaintiff's picture was used. The program consisted of five segments involving displays and discussion of public nudity. In a 10-minute segment entitled Naked City, HBO photographers followed defendant Tunick as he photographed models posing naked on various streets throughout New York City. The segment also included interviews with Tunick about his work, which he characterized as fine art photography, and showed scenes **[***2]** of crowds that gathered at the various locations as Tunick photographed the models. Plaintiff appeared as part of a crowd scene. According to plaintiff's affidavit, she was on her way home from a job in the financial district when she saw a crowd and stopped to look at what was going on. "I was there maybe *30 seconds or less* as I walked by and stopped for a look at what the crowd was viewing" (emphasis in original). On two occasions, neither lasting more than two to three seconds, the segment flashed from Tunick to the crowd scene in which plaintiff appeared. (The segment arguably showed plaintiff two more times, each for about one second, in which she was identifiable not by face but by clothing or hair style.) In addition, a close-up of plaintiff was shown in the introduction to the program, with other excerpts from the Naked City segment, and excerpts from the other segments **[*502]** of the **[**709]** program. This close-up, in which plaintiff is visible against a background of other spectators, was obtained from the crowd scene. In the crowd scene, as well as the close-up, plaintiff appears with her hand on her face, shaking her head back and forth. For purposes **[***3]** of this motion, plaintiff's statement that she was unaware that she was being photographed is taken as true. It is undisputed that plaintiff did not consent either to be photographed or to have her image used in the HBO program.

CIVIL RIGHTS LAW CLAIM

HN1 New York State does not recognize a common-law right to privacy. Judicial relief for privacy claims is available solely under Civil Rights Law §§ 50 and 51, which provide a right of action only for use of a person's name or picture for "advertising" or "trade" purposes without prior written consent. (*Howell v New York Post Co.*, 81 N.Y.2d 115 [1993].) n1

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n1 As noted in *Howell v New York Post Co. (supra,* at 123), at least three other privacy torts have been recognized elsewhere: unreasonable publicity given to another's private life; unreasonable intrusion upon seclusion; and publicity that unreasonably places another in a false light. In New York, the Legislature has declined to expand the scope of the right to privacy beyond the narrow reach of sections 50 and 51, which prohibit only the commercial appropriation of a person's name or image. (*Arrington v New York Times Co.*, 55 N.Y.2d 433, 439-440, 449 N.Y.S.2d 941, 434 N.E.2d 1319 [1982], *rearg denied* 57 N.Y.2d 669, *cert denied* 459 U.S. 1146 [1983].)

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[***4]**

From the time of the statute's enactment, the courts have consistently held that HN2 the terms advertising or trade purposes "should not be construed to apply to publications concerning newsworthy events or matters of public interest". (Stephano v News Group Publs., 64 N.Y.2d 174, 184, 485 N.Y.S.2d 220, 474 N.E.2d 580 [1984]; Gautier v Pro-Football, Inc., 304 N.Y. 354, 107 N.E.2d 485 [1952].) The term public interest has been "liberally applied" or "freely defined", in recognition of "Federal and State constitutional concerns for free dissemination of news and other matters of interest to the public". (Stephano v News Group Publs., supra, at 184; Arrington v New York Times Co., supra, 55 N.Y.2d at 440.) The newsworthiness or public interest exception n2 has been held to apply not only to "hard news" such as reports of political happenings, but also to social trends and matters of interest to consumers. (See, Stephano v News Group Publs., supra.) The exception thus encompasses spontaneous coverage of events in progress, as well as planned coverage of "human interest" stories. As explained in an early but still influential case under the statute, **[*503]** **[***5]** "[n]ewspapers publish articles which are neither strictly news items nor strictly fictional in character. They are not the responses to an event of peculiarly immediate interest but, though based on fact, are used to satisfy an ever-present educational need ... As a general rule, such cases are not within the purview of the statute." (Lahiri v Daily Mirror, 162 Misc. 776, 782, 295 N.Y.S. 382 [Sup Ct, NY County 1937].) n3

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n2 These terms are used interchangeably in this opinion.
n3 Since *Lahiri v Daily Mirror (supra)*, HN3 the newsworthiness exception to the Civil Rights Law has been extended to " 'communications media', in the broadest sense of that term (e.g., the magazine, newspaper, radio and television, motion picture and poster industries)." (Beverley v Choices Women's Med. Ctr., 141 A.D.2d 89, 94, 532 N.Y.S.2d 400 [2d Dept 1988].)

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Significantly, also, HN4 a narrow scope of review has been adopted in evaluating editorial judgments as to what constitutes a matter of genuine public **[***6]** interest for purposes of Civil Rights Law §§ 50 and 51: As "questions of 'newsworthiness' are better left to reasonable editorial judgment and discretion ... judicial intervention should occur only in those instances where there is ' "no real relationship" ' between a photograph and an article or where the article is an ' "advertisement in disguise".' " (Finger v Omni Publs. Intl., 77 N.Y.2d 138, 143, 564 N.Y.S.2d 1014, 566 N.E.2d 141 [1990], quoting Murray v New York Mag. Co., 27 N.Y.2d 406, 409, 318 N.Y.S.2d 474, 267 N.E.2d 256; see also, **[**710]** Gaeta v New York News, 62 N.Y.2d 340, 349, 477 N.Y.S.2d 82, 465 N.E.2d 802 [1984].)

Under these standards, the HBO program in which plaintiff was pictured concerned a matter of public interest. At the outset, the court rejects plaintiff's contention that this issue must be determined at trial. Nearly all of the reported cases which have considered the applicability of the public interest exception to Civil Rights Law §§ 50 and 51 have been decided as a matter of law, on motions for summary judgment or to dismiss for failure to state a cause of action. This result is not surprising, given the judicial deference **[***7]** paid to the media's editorial judgments.

Nor is a different result required in the instant case, as plaintiff points to no objective

circumstances which raise a factual issue as to whether a bona fide exercise of editorial judgment has occurred. Indeed, in this much litigated area, even the newsworthiness of public nudity is not a matter of first impression. Thus, ***Creel v Crown Publs.* (115 A.D.2d 414, 415, 496 N.Y.S.2d 219** [1st Dept 1985]) held that Civil Rights Law §§ 50 and 51 were not violated where a nude photo taken of the plaintiff at a beach was later used, without the plaintiff's permission, in a guide book on nude beaches. The Court concluded as a matter of law that the book on nude beaches was "a matter of some **[*504]** public interest" (at 415). *(See also, Ann-Margret v High Socy. Mag.*, 498 F. Supp. 401 [SD NY 1980] [nude photo of celebrity held newsworthy]; *Davis v High Socy. Mag.*, 90 A.D.2d 374, 457 N.Y.S.2d 308 [2d Dept 1982], *appeal dismissed* 58 N.Y.2d 1115 [1983] [dictum that nude celebrity photo would be newsworthy].) Similarly, it cannot be said that public nudity and the public's response to it, such as was featured in the **[***8]** HBO program, is not a "matter of some public interest."

There is also no issue of fact as to whether plaintiff's picture was used for purposes of trade. Although the statute does not define "purposes of trade", it has repeatedly been held that HN5 " ' "[a] picture illustrating an article on a matter of public interest is not considered used for the purposes of trade or advertising ... unless it has no real relationship to the article ... or unless the article is an advertisement in disguise" ' ". *(Arrington v New York Times Co., supra,* 55 N.Y.2d at 440, quoting *Murray v New York Mag. Co., supra,* 27 N.Y.2d at 409, quoting *Dallesandro v Holt & Co.*, 4 A.D.2d 470, 471, 166 N.Y.S.2d 805, *appeal dismissed* 7 N.Y.2d 735, 193 N.Y.S.2d 635, 162 N.E.2d 726.) The fact that a publication is produced for profit or even that a picture is included in the publication for the purpose of increasing profits does not constitute a use for trade; as most publications of newsworthy information operate on a for-profit basis, a contrary rule would effectively eliminate their exemption from the statute. *(Stephano v News Group Publs., supra,* 64 N.Y.2d at 184-185; *Arrington v New* **[***9]** *York Times Co., supra.)* Plaintiff's apparent argument that her image made the HBO program more interesting and, hence, more saleable is thus unavailing to show an impermissible trade usage. Nor does the fact that the program was licensed for distribution show a use for trade any more than would printing and distributing multiple copies of a newspaper. *(See, Delan v CBS, Inc.*, 91 A.D.2d 255, 260, 458 N.Y.S.2d 608 [2d Dept 1983].)

In arguing that HBO used plaintiff's picture for trade, plaintiff also cites the "staged" elements of the program--in particular, HBO's advance arrangement with defendant Tunick for cameras to follow him as he photographed the nude models, and HBO's payment to Tunick for his appearance on the program. The fact that the Tunick photography shoot was staged in this sense does not cause it to lose its newsworthiness. *(See, Stephano v News Group Publs., supra,* at 184; *Pagan v New York Herald Tribune,* 32 A.D.2d 341, 301 N.Y.S.2d 120 [1st Dept 1969], *affd* 26 N.Y.2d 941, 310 N.Y.S.2d 327, 258 N.E.2d 727.) The staging or prearrangement merely permitted Tunick's work to be memorialized on film. Plaintiff makes **[*505]** no suggestion **[***10]** that Tunick was not a "real" photographer whose work HBO was documenting, or that the segment featuring Tunick was otherwise a fictional creation of **[**711]** HBO. Nor does plaintiff suggest that the crowd in which she appeared was in any respect staged, that it gathered other than on a wholly spontaneous basis in response to Tunick's photography session, or that plaintiff's own image was in any respect altered or falsified. Plaintiff's picture also bears a real relationship to the subject matter of the HBO program. While plaintiff appears to object to any use of her picture in the program, she complains especially of the extraction of her image from the crowd scene and its use in the introduction to the program. However, under also settled law the use of the image in both contexts was permissible.

As plaintiff acknowledges, she voluntarily joined the crowd that was viewing defendant Tunick in the act of photographing nude models. Her picture as part of the crowd thus clearly bears a direct relationship to the subject matter of the segment, which included the public's response to the models' public nudity. The picture of plaintiff which has been taken from the

crowd scene **[***11]** is merely a close-up of plaintiff which shows her reaction to what she has viewed. It thus bears a real relationship not only to the segment but also to one of the themes of the program as a whole--the public's reaction to public displays of nudity. Its use in the introduction was therefore not violative of the Civil Rights Law.

While there is some authority that a mere spectator may not be picked out of a crowd, or "singled out and unduly featured merely because he is on the scene" *(Gautier v Pro-Football, Inc., supra,* 304 N.Y. at 359 [dictum]; *Delan v CBS, Inc., supra,* 91 A.D.2d at 260 [dictum]; *Blumenthal v Picture Classics,* 235 A.D. 570, 257 N.Y.S. 800 [1st Dept 1932], *affd* 261 N.Y. 504, 185 N.E. 713 [1933]), this authority is effectively limited by *Murray v New York Mag. Co.* (27 N.Y.2d 406, 318 N.Y.S.2d 474, 267 N.E.2d 256, *supra). Murray* involved the unauthorized use of the plaintiff's picture on the front cover of the magazine to illustrate a story on contemporary attitudes of Irish-Americans in New York City. The picture, which showed plaintiff dressed in "typically Irish garb" *(supra,* at 408), had been taken without his consent **[***12]** while he was watching the St. Patrick's Day parade. In upholding the use, the Court, addressing *Gautier (supra),* noted that the plaintiff "voluntarily became part of the spectacle", and was permissibly "singled out and photographed because his presence constituted a visual participation in a public event which invited special attention." *(Supra,* at 409.) **[*506]**

Current authority goes even further in permitting HN6 the unauthorized use of an individual's picture to illustrate an article, even where the individual was not on the scene of or did not personally participate in the events depicted in the article, so long as the article concerns a matter of public interest, and the picture bears a "real relationship" to the subject matter of the article. *(E.g., Arrington v New York Times Co.,* 55 N.Y.2d 433, 449 N.Y.S.2d 941, 434 N.E.2d 1319, *supra* [upholding unauthorized use of photograph taken of plaintiff without his knowledge, on front cover of New York Times Magazine, "as the most prominent illustration" (at 437) of feature article on " '(t)he Black Middle Class' " *(supra);* Court found " 'real relationship' " (at 441) between photograph and article, as plaintiff **[***13]** in fact appeared from the picture to be a " 'middle class' man of good taste and attire" *(supra)]; Finger v Omni Publs. Intl.,* 77 N.Y.2d 138, 564 N.Y.S.2d 1014, 566 N.E.2d 141, *supra* [upholding unauthorized use of photograph of plaintiffs with their six children above caption regarding research on *in vitro* fertilization, although plaintiffs had not conceived their family by such fertilization nor participated in the research referred to in article; Court found " 'real relationship' " (at 143) between picture of plaintiffs' large family and general fertility theme of article]; *Alvarado v K-III Mag. Corp.,* 203 A.D.2d 135, 610 N.Y.S.2d 241 [1st Dept 1994] [upholding unauthorized use of picture of plaintiffs at a concert to illustrate article on Mexican immigrant life, above caption referring to Mexicans' attendance at concert which was "beer swilling" event, where plaintiffs were not Mexican and concert they attended was alcohol free; Court **[**712]** found photograph bore real relationship to article, as it depicted plaintiffs "concededly enjoying a concert" (at 136)].)

These cases are instructive as to the limits of the expectation of privacy. They permit **[***14]** what are essentially stock photographs to be used, outside the context in which they were taken, to illustrate related topics. In permitting such use, the courts are not unmindful of the "perfectly understandable preference" that one's picture not be used without consent, and of the very real discomfort that may be felt when the picture is used to illustrate a publication expressing views not consonant with or, worse, offensive to one's own. *(See, Arrington v New York Times Co., supra,* at 441; ***Creel v Crown Publs., supra,* 115 A.D.2d at 416.**) Yet, as the *Arrington* Court reminds, "an inability to vindicate a personal pred[i]lection for greater privacy may be part of the price every person must be prepared to pay for a society in which information and opinion flow freely." *(Supra,* at 442.) **[*507]**

In the instant case, the connection between the plaintiff's picture and its use in the program is even more direct than in the *Arrington* line of cases. As plaintiff voluntarily joined the

crowd, and as a newsworthy incident affecting the crowd was taking place, her expectation of privacy was or should have been limited. *(See, Murray v New York Mag. Co.,* **[***15]** *supra,* 27 N.Y.2d at 409; *Gautier v Pro-Football, Inc., supra,* 304 N.Y. at 360.) Whatever her expectations of privacy should have been, her embarrassment--however genuine and deeply rooted in principle--cannot render the use of her picture actionable under the Civil Rights Law in the face of the constitutional concerns to which this statute is subject. Plaintiffs' claim under sections 50 and 51 is accordingly dismissed on the merits.

DEFAMATION CLAIM

The endorsed complaint by which this action was commenced pleaded the defamation claim as follows: "Cause of Action No. 1: Defamation in that Plaintiff appears to be in a pornographic film/video including placing plaintiff in a false light." Construing this pleading as alleging solely a common-law false light tort, defendants moved to dismiss on the ground that this tort is not recognized by New York law. *(See, Howell v New York Post Co., supra,* 81 N.Y.2d at 123.) In response to the motion, plaintiff purported to withdraw the independent false light cause of action, but contended that she still had a cause of action for "simple defamation." Defendants argued in reply that plaintiff should not now be permitted to "retool" **[***16]** her complaint to plead defamation and, alternatively, that if the complaint does plead defamation it is defective for failure to comply with the requirements of CPLR 3016.

These contentions are incorrect. The complaint as originally pleaded alleges defamation and not merely an independent false light claim. Plaintiff's bill of particulars also amplifies the complaint, alleging that the HBO program defamed plaintiff by "suggesting that [she] willingly took part in adult-sexually-explicit programming." Moreover, the rules applicable to formal pleadings in Supreme Court are not applicable to the endorsement pleadings permitted in this court. *(See,* CCA 902 [a] [1]; 903.) HN7 An endorsement pleading need only set forth "the nature and substance of the cause of action". (CCA 902 [a] [1].) It need not comply with the requirement of CPLR 3013 applicable to formal pleadings generally, or with the requirements of CPLR 3016 regarding particular allegations to be pleaded in specific actions, including actions for defamation. **[*508]** *(See, Southern Blvd. Sound v Felix Storch, Inc.,* NYLJ, Feb. 28, 1996, at 25, col 3 [App Term, 1st Dept]; Siegel, Practice Commentaries, **[***17]** McKinney's Cons Laws of NY, Book 29A, CCA 903, at 177-179.) The complaint therefore is not defective on its face.

While defendants also addressed the merits of the defamation claim, their arguments on the merits were not raised for the first time until the reply, leading to a spate of unauthorized, piecemeal surreply letters, and arguably depriving plaintiff of a fair opportunity to respond. Moreover, neither party brought to the court's attention the substantial legal authority bearing on whether the HBO program is subject to a defamatory **[**713]** interpretation. n4 Under these circumstances, defendants' motion to dismiss the defamation cause of action is not properly heard on these papers. *(See, Ritt v Lenox Hill Hosp.,* 182 A.D.2d 560, 582 N.Y.S.2d 712 [1st Dept 1992].) The motion is accordingly denied without prejudice to renewal on proper papers, insofar as it concerns the merits of the defamation claim against defendant HBO.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n4 While both sides discussed the relevance to this case of isolated cases *(e.g., Geary v Goldstein,* 831 F. Supp. 269 [SD NY 1993]), neither party argued the relevance of the substantial body of case law developed under the common-law false light cause of action to defamation claims, like plaintiff's, which are also based on false light allegations. Nor did the parties cite case law relevant to the determination of the legal significance of the use of plaintiff's image in the introduction: Both sides, for example, wholly neglected the potentially

analogous "headlines" cases. *(E.g., Gambuzza v Time, Inc.*, 18 A.D.2d 351, 239 N.Y.S.2d 466 [1st Dept 1963].)

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***18]**

The complaint, including defamation claim, is dismissed in its entirety against defendant Tunick. Plaintiff offers no opposition to Tunick's request for dismissal, and does not claim even on this motion that Tunick played any role in the production or distribution of the HBO program.

PROOF OF SERVICE

I am employed in the County of Los Angeles. State of California. I am over the age of 18 and not a party to the within action. My business address is Time Machine. 132 S. Beaudry Avenue, Los Angeles, CA 90012. On January 18, 2006, I served the within document(s) described as:

DEFENDANT TERRY RICHARDSON'S NOTICE OF SPECIAL MOTION AND SPECIAL MOTION ("SLAPP') TO STRIKE PLAINTIFF'S COMPLAINT PURSUANT TO C.C.P. SECTION 425.16; MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATIONS OF TERRY RICHARDSON, ALEX WIEDERIN, SCOTT HAGENDORF AND MICHAEL E. WEINSTEN IN SUPPORT THEREOF

on each interested party in this action as stated below:

Richard Lloyd Sherman, Esq.
Ken Nathanson, Esq.
Craig J. Englander, Esq.
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9454 Wilshire Boulevard
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[X] (BY PERSONAL SERVICE) I delivered a true copy of the foregoing document(s) in a sealed envelope by hand to the offices of the above addressee(s).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 18, 2006, at Los Angeles, California.

STEVEN PHILLIPS
(Type or print name)
Time Machine

(Signature)