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THE SCHWARZENEGGER BOBBLEHEAD CASE: INTRODUCTION AND STATEMENT OF FACTS

Tyler T. Ochoa*

In May 2004, news media around the world buzzed after learning that Arnold Schwarzenegger, movie-star-turned-Governor of California, had filed a lawsuit against an Ohio manufacturer of bobblehead dolls bearing his name and likeness.¹ The case presented a seemingly stark choice between the right of a celebrity-politician to protect his image against commercial appropriation and the First Amendment rights of the public to lampoon that image, and commentators hoped that the case would set a precedent regarding how those rights should be balanced.² Just three months later, however, before any court ruling had been made, the parties announced that they had reached a settlement,³ leaving that important legal issue unresolved.

Shortly after the case settled, the *Santa Clara Law Review* invited counsel for the parties to debate the legal issues

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1. See, e.g., John M. Broder, *Schwarzenegger Files Suit Against Bobblehead Maker*, N.Y. TIMES, May 18, 2004, at A16; Dan Glaister, *It's Personal and It's Business: Arnie Sues to Terminate Doll*, THE GUARDIAN (U.K.), May 19, 2004, at 11, available at 2004 WL 75674226; *Schwarzenegger Sues Bobblehead Doll Maker*, AGENCE FRANCE-PRESS, May 18, 2004, available at 2004 WL 80340273; Steffen Burkhardt, *Celebrity of the Week: Arnold Schwarzenegger*, WELT AM SONNTAG, May 23, 2004, at 61; "Schwarzy" Veta Los Muñecos "Muevecabeza" Inspirados en Él, EL PERIÓDICO DE CATALUNYA, May 3, 2004, available at 2004 WL 76189338.

2. See, e.g., Editorial, *Schwarzenegger vs. Free Speech*, HARTFORD COURANT, May 25, 2004, at A10.

3. See John M. Broder, *Bobblehead is Stilled*, N.Y. TIMES, Aug. 3, 2004, at A17; Lynda Gledhill, *Governor's Bobblehead Says Farewell to Arms*, S.F. CHRONICLE, Aug. 3, 2004, at A2, available at 2004 WL 58604055; Stephen Hudak, *Bobblehead Settlement Gets Nod*, CLEVELAND PLAIN-DEALER, Aug. 3, 2004, at B1, available at 2004 WL 57901008; Kevin Yamamura, *Governor's Bobblehead Lives—Without Weapon*, SACRAMENTO BEE, Aug. 3, 2004, at A3, available at 2004 WL 86982506.

raised by the case in a written symposium. The purpose of this symposium is to preserve the legal arguments of the parties for posterity and to provide guidance for courts and counsel facing similar issues in the future. This Introduction sets forth the facts of the case, as compiled from publicly available sources. Plaintiff's counsel, Charles J. Harder and Henry L. Self, III of Lavelly & Singer, argue in favor of protecting Governor Schwarzenegger's statutory and common-law right of publicity,⁴ while Defendant's counsel, William T. Gallagher of Townsend & Townsend & Crew, contends that the doll should be protected by the First Amendment.⁵ Academic commentary is provided by Professor Shubha Ghosh of the State University of New York at Buffalo,⁶ and Professors David S. Welkowitz of Whittier Law School and Tyler T. Ochoa of Santa Clara University School of Law.⁷

THE PLAINTIFFS

Arnold Schwarzenegger needs no introduction to the legion of fans who made him a movie star. In the words of the Complaint, Schwarzenegger is "a universally known motion picture star and celebrity who, for more than three decades, has starred in and received critical acclaim for his performances in motion pictures that have been viewed by millions of people throughout the United States and the world."⁸

Born in Austria in 1947, Schwarzenegger first came to fame as a champion bodybuilder. He won the Mr. Universe Amateur title in 1967, and the Mr. Universe Professional title in 1968, 1969, and 1970.⁹ He also won the first of six consecu-

4. See Charles J. Harder and Henry L. Self, III, *Schwarzenegger vs. Bobbleheads: The Case for Schwarzenegger*, 45 SANTA CLARA L. REV. 557 (2005).

5. See William T. Gallagher, *Strategic Intellectual Property Litigation, the Right of Publicity, and the Attenuation of Free Speech: Lessons from the Schwarzenegger Bobblehead Doll War (and Peace)*, 45 SANTA CLARA L. REV. 581 (2005).

6. See Shubha Ghosh, *On Bobbling Heads, Paparazzi, and Justice Hugo Black*, 45 SANTA CLARA L. REV. 617 (2005).

7. See David S. Welkowitz and Tyler T. Ochoa, *The Terminator as Eraser: How Arnold Schwarzenegger Used the Right of Publicity to Terminate Non-Defamatory Political Speech*, 45 SANTA CLARA L. REV. 651 (2005).

8. Complaint ¶ 10, *Oak Prods., Inc. v. Ohio Disc. Merch., Inc.*, No. SC081563 (Los Angeles Super. Ct. filed Apr. 30, 2004).

9. See <http://www.schwarzenegger.com/en/athlete/mreverything> (last visited Mar. 16, 2005); http://www.nabba-international.org/universe_legends.htm (last visited Apr. 25, 2005).

tive Mr. Olympia titles in 1970,¹⁰ the sixth of which was chronicled in the successful documentary film *Pumping Iron* (1977). His bodybuilding career attracted the attention of Hollywood, landing him leading roles in films such as *Conan the Barbarian* (1982). His breakthrough came in his role as a killer cyborg from the future in *The Terminator* (1984), a role he later reprised in *Terminator 2: Judgment Day* (1991) and *Terminator 3: Rise of the Machines* (2003). Schwarzenegger went on to star in such action movies as *Commando* (1985), *Predator* (1987), *Total Recall* (1990), *True Lies* (1994), *Eraser* (1996), and *Collateral Damage* (2002), and in comedies such as *Twins* (1988) and *Kindergarten Cop* (1990).¹¹

In 1986, Schwarzenegger married journalist Maria Shriver, daughter of Eunice Kennedy and R. Sargent Shriver, and niece of John F., Robert, and Ted Kennedy.¹² On August 6, 2003, Schwarzenegger announced on *The Tonight Show* with Jay Leno that he would run for Governor of California in a special election in which voters would decide whether to recall Governor Gray Davis.¹³ He won the election and was sworn in as California's 38th Governor on November 17, 2003.¹⁴

Plaintiff Oak Productions, Inc. ("Oak Productions"), is a California corporation formed by Schwarzenegger to manage his rights of publicity.¹⁵ According to the Complaint, "[o]ther than in connection with his motion pictures, Plaintiff does not permit Schwarzenegger's name, photograph, likeness or voice to be used on commercial products, on packaging for commercial products, or in advertising for commercial products or

10. See <http://www.ifbb.com/ifbbolympia/history.htm> (last visited Mar. 16, 2005). Schwarzenegger came out of retirement to win a seventh Mr. Olympia title in 1980. *Id.*; see also <http://www.ifbb.com/contestresults/mrolympia/> (last visited Mar. 16, 2005).

11. See <http://www.imdb.com/name/nm0000216/> (last visited Mar. 28, 2005); <http://www.schwarzenegger.com/en/actor/filmography> (last visited Mar. 16, 2005).

12. See <http://www.imdb.com/name/nm0005425/bio> (last visited Mar. 28, 2005).

13. See Michael Finnegan & Gregg Jones, *Schwarzenegger In, Feinstein Out; Arianna Huffington, Democrat Bustamante Join Recall Race*, L.A. TIMES, Aug. 7, 2003, at A1.

14. See Peter Nicholas & Joe Mathews, *Schwarzenegger Sworn In, Rescinds Car Tax Increase*, L.A. TIMES, Nov. 18, 2003, at A1.

15. See Complaint ¶¶ 1, 10, *Oak Prods., Inc. v. Ohio Disc. Merch., Inc.*, *supra* note 8 ("Plaintiff owns all rights of publicity of Arnold Schwarzenegger.").

services in the United States.”¹⁶

Plaintiff Fitness Publications, Inc. (“Fitness”), is a California corporation formed by Schwarzenegger to publish books and magazines about weightlifting.¹⁷ Fitness owns a registered copyright in the 1970s bodybuilder photograph of Schwarzenegger that appears on the box in which the bobblehead doll was sold.¹⁸ Fitness is also the assignee of the right to pursue a copyright infringement action in a second photograph that appears on the box, the copyright of which is owned by Beacon Communications, LLC,¹⁹ which produced the motion picture *End of Days* (1999), starring Arnold Schwarzenegger.²⁰

THE DEFENDANTS AND THE DOLL

Defendants Todd and Toby Bosley are the co-owners of Ohio Discount Merchandise, Inc. (“ODM”), an Ohio corporation that manufactures and sells merchandise through various marketing channels, including the Internet.²¹ Since 2000, ODM has manufactured and sold a series of bobblehead dolls of various political figures,²² including Presidents George Washington, Thomas Jefferson, Abe Lincoln, Teddy Roosevelt, Franklin D. Roosevelt, John F. Kennedy, Richard Nixon,

16. *Id.* ¶ 10.

17. See Lance Williams, *Over 125 take on Davis FINANCES: Actor's first disclosure of money muscle*, S.F. CHRONICLE, Aug. 10, 2003 at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/08/10/MN274950.DTL> (last visited Mar. 28, 2005).

18. See Complaint for Copyright Infringement ¶ 15, *Fitness Prods., Inc. v. Ohio Disc. Merch., Inc.*, No. CV-04-3965 (C.D. Cal. filed June 3, 2004).

19. *Id.* ¶ 16. At the time, such an assignment had been held sufficient to confer standing on Fitness; but the Ninth Circuit subsequently disapproved that holding. See *Silvers v. Sony Pictures Entm't, Inc.*, 330 F.3d 1204 (9th Cir. 2003) (holding that an accrued cause of action for copyright infringement may be transferred to a third party and that the third party has standing to sue without being the owner of an exclusive right), *reh'g en banc granted*, 370 F.3d 1252 (9th Cir. 2004), *on reh'g*, 402 F.3d 881 (9th Cir. 2005) (en banc) (assignee of an accrued cause of action who is not also the holder of a legal or beneficial interest in the copyright itself lacks standing to sue for copyright infringement under 17 U.S.C. §504(b)).

20. See <http://www.imdb.com/title/tt0146675/combined> (last visited Mar. 16, 2005).

21. See <http://www.bosleybobbers.com/cgi-bin/store/agora.cgi?page=about.html> (last visited Apr. 25, 2005).

22. See Cross-Complaint for Declaratory Relief ¶ 4, *Oak Prods., Inc. v. Ohio Discount Merchandise, Inc.*, No. SC081563 (Los Angeles Super. Ct. filed May 27, 2004).

Jimmy Carter, Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush, and First Ladies Jackie Kennedy, Hillary Clinton, and Laura Bush.²³ ODM also sells bobblehead dolls of entertainment and other celebrities,²⁴ religious figures,²⁵ and cartoon characters.²⁶

In October 2003, John Edgell, a Washington lobbyist and former Chief of Staff for Congressman Dennis Kucinich (D-Ohio),²⁷ entered into a business relationship with the Bosleys and ODM to manufacture and sell bobblehead dolls of four politicians: three candidates for the Democratic nomination for President of the United States (John Kerry, Howard Dean, and Wesley Clark) and California gubernatorial candidate Arnold Schwarzenegger.²⁸ Edgell and the Bosleys dispute the details of the business deal: Edgell claims that he “conceived the idea to produce and market certain political bobbleheads to coincide with the [2004] primary and general election campaigns,”²⁹ that he contracted with ODM to manufacture the dolls,³⁰ and that he was to receive “exclusive” ownership of the molds and a substantial share of the net proceeds.³¹ The Bosleys concede that Edgell approached them with the idea, but they claim that they designed the dolls, that the molds belong to them, and that the only financial arrangement with Edgell was that they would donate a portion of the proceeds to the Kristen Ann Carr Fund for sarcoma cancer research.³²

The Arnold Schwarzenegger doll stands eight inches

23. See “Bobbing Head Dolls” and “Retired Bobbing Head Dolls” at <http://www.bosleybobbers.com> (last visited Mar. 16, 2005).

24. *E.g.*, Sammy Davis, Jr., James Dean, Albert Einstein, Harry Houdini, Anna Nicole Smith, Vince Lombardi. *Id.*

25. *E.g.*, Jesus and Pope John Paul II. *Id.*

26. *E.g.*, Beetle Bailey, Dennis the Menace, Flash Gordon, and Felix the Cat. *Id.*

27. See Yamamura, *supra* note 3.

28. See Complaint ¶¶ 10-15, Edgell v. Ohio Disc. Merch., Inc., No. 1:04-CV-01716 (D.D.C. filed Oct. 6, 2004). The parties subsequently added a doll of House Majority Leader Tom DeLay. *Id.* ¶ 15. Edgell has sued ODM and the Bosleys for breach of contract, alleging that they have wrongfully withheld proceeds due to Edgell. The Bosleys deny Edgell’s allegations.

29. *Id.* ¶ 10.

30. *Id.* ¶¶ 11, 12, 15.

31. *Id.* ¶¶ 14, 19.

32. See Lisa Friedman, *Governor Shaken Up Over Bobble-Head Dolls*, L.A. DAILY NEWS, May 1, 2004, at N5 (“[Toby] Bosley said the election series . . . was created as a favor to a friend to raise money for the Kristen Ann Carr Fund for sarcoma research.”); see also www.sarcoma.com (last visited Mar. 16, 2005).

high. It depicts Schwarzenegger in a gray business suit, white shirt and red tie, standing on a red circular base inscribed with his name, holding an assault rifle and wearing a bandolier or ammunition belt over his shoulder.³³ Edgell claims that he conceived the idea of depicting Schwarzenegger carrying an assault rifle.³⁴ The box in which the doll is packaged features three photos of Schwarzenegger campaigning in a business suit and a small photo of his inauguration. One side of the box displays some brief biographical facts about Schwarzenegger with the Fitness photo of him as a bodybuilder in the background; while another features the Beacon publicity photo of him from *End of Days* in a tank top with the stubble of a beard. Schwarzenegger's name is featured in large blue letters on all four sides of the box.³⁵ Beginning in February 2004, the dolls were sold on ODM's website, www.bosleybobbers.com, for \$19.99 each,³⁶ as well as on eBay and at the State Capitol gift shop in Sacramento.³⁷

THE DISPUTE

The Bosleys allege that "Schwarzenegger became aware of the doll when his wife, Maria Shriver, visited a [Sacramento] gift shop. . . . She was offended and asked the shopkeeper to remove it from the shelves."³⁸ On April 29, 2004,

33. A photo of the doll is attached. *See Appendix A, Photo One, infra* p. 675.

34. *See* Bobby Caina Calvan, *Schwarzenegger Watches Image: Settlement Keeps Gun-Toting Doll Off Store Shelves*, BOSTON GLOBE, Sept. 10, 2004, at A2 ("John Edgell [claims he] came up with the idea for the gun-toting doll. 'The bobblehead was satirical. That I put a gun in his hands, that was political speech.'"); Stephan Hudak, *Doll Shakes Up Schwarzenegger*, CLEVELAND PLAIN-DEALER, May 1, 2004, at A1 ("Edgell said he put the gun in the Schwarzenegger's hands. 'I figured any governor of a state with a budget deficit the size of California's ought to have a large-caliber firearm as standard issue,' he said.").

35. Two photos of the box are attached. *See Appendix A, Photos Two and Three, infra* p. 676.

36. ODM's bobblehead dolls normally sell at a retail price of \$14.99. The dolls in question were sold for \$19.99. Edgell's lawsuit alleges that the additional \$5 was intended to fund the charitable contribution, and that he made a charitable contribution but was never reimbursed by ODM. *See* Complaint, *Edgell v. Ohio Disc. Merch. Inc.*, *supra* note 28, ¶¶ 16, 19, 27.

37. *See* Complaint at ¶ 25, *Edgell v. Ohio Disc. Merch., Inc.*, *supra* note 28; Hudak, *supra* note 34, at A1.

38. Associated Press, *Arnold Wants Bobblehead Dolls of Him "Terminated,"* CHICAGO SUN-TIMES, May 2, 2004, at 59. The Associated Press article states that Shriver saw the dolls at a gift shop in "Washington" (D.C.), but other sources indicate that the gift shop was Capitol Books and Gifts in Sacramento.

counsel for Oak Productions sent a cease-and-desist letter to ODM.³⁹ The letter stated that “your outrageous, malicious and tortious actions constitute an unauthorized commercial exploitation of my client’s publicity rights,”⁴⁰ and it demanded that ODM immediately cease producing and marketing the doll, deliver all remaining dolls to Oak Productions, and make a substantial payment to Oak Productions “as compensation for the damages you have caused.”⁴¹ Upon receiving the letter, Toby Bosley of ODM called counsel for Oak Productions and took the position that Schwarzenegger’s name and likeness were “public domain” and could be used without permission.⁴² Bosley refused Oak Productions’ demand to cease and desist from further sales and marketing of the dolls and packaging.⁴³ Bosley also sent the demand letter to The Smoking Gun, which immediately published the letter on its website.⁴⁴ Oak Productions filed a Complaint against ODM and the Bosleys in Los Angeles County Superior Court on April 30, 2004.⁴⁵ The Complaint sought damages and a preliminary and permanent injunction against the sale of the bobblehead dolls, plus costs and attorneys’ fees, based on an alleged violation of Schwarzenegger’s common-law right of publicity and

See Jill Duman, *Arnold Aims to Control His Image*, THE RECORDER, May 6, 2004 (“Todd Bosley said he received the [cease-and-desist] letter shortly after getting a call from the ‘frazzled’ proprietor of a small gift shop in the basement of the state capitol building.”); Hudak, *supra* note 34, at A1 (“The bobblehead . . . was removed Thursday from the shelves of a gift store in the California Capitol after a Schwarzenegger aide complained.”).

39. *See* Letter from Martin D. Singer, attorney for Schwarzenegger, to Todd D. Bosley, President, Ohio Disc. Merch., Apr. 29, 2004, *available at* <http://www.thesmokinggun.com/archive/0430042arnold1.html> (last visited Mar. 16, 2005) (demanding that Ohio Discount Merchandise cease and desist using Schwarzenegger’s image).

40. *Id.* at 2.

41. *Id.* The letter also attempted to squelch publicity by threatening that “any republishing or dissemination of [this letter], including but not limited to the posting of the contents hereof on the Internet, shall constitute a copyright infringement and will subject the re-publisher(s) to civil liability for such actions.” *Id.* at 3.

42. Telephone interview with Charles Harder, counsel for Oak Prods., Inc. (Nov., 2004).

43. *Id.*

44. *See* Letter from Martin D. Singer, *supra* note 39, at 3.

45. *See* Complaint, Oak Prods., Inc. v. Ohio Disc. Merch., Inc., No., *supra* note 8. The Complaint also named “Bosley Bobbing Head Doll Company” and “Toady Bose Fun Products” as Defendants. *Id.* Those are additional names under which ODM and the Bosleys conduct business; neither is a separate legal entity.

California unfair competition law.⁴⁶ The Complaint was served on May 4, 2004.⁴⁷

Numerous news stories appeared in the days following publication of the demand letter on The Smoking Gun website.⁴⁸ On May 7, 2004, counsel for the Bosleys sent a written response to the cease-and-desist letter, alleging that “the sale of these bobblehead dolls is an expressive activity that clearly is protected by the First Amendment.”⁴⁹ On May 27, 2004, ODM filed an Answer and Cross-Complaint,⁵⁰ seeking a judicial declaration that the dolls were protected by both the First Amendment and the California Constitution.⁵¹ The next day, the defendants filed a Notice of Removal in the United States District Court for the Central District of California.⁵²

Shortly before the case was removed, Oak Productions filed an amendment to the Complaint in the original lawsuit, adding Edgell as a defendant.⁵³ On June 3, 2004, Fitness filed a new lawsuit in the Central District of California charging ODM, the Bosleys and Edgell with copyright infringement, based on the use on the box of two photographs, one owned by Fitness, and the other owned by Beacon, as to which Fitness received an assignment of the right to bring an infringement action.⁵⁴

46. *Id.* at 5-9. The Complaint alleged four “causes of action:” Violation of Right of Publicity, Unfair Competition, Unjust Enrichment, and Preliminary and Permanent Injunctions. *Id.*

47. *See* Notice of Removal ¶ 1, Oak Prods., Inc. v. Ohio Disc. Merch., Inc., No. CV-04-3821 (C.D. Cal. filed May 28, 2004).

48. *See supra* notes 1, 32, 34, and 38.

49. Letter from William T. Gallagher to Martin D. Singer, Re: Oak Prods., Inc. v. Ohio Disc. Merch., Inc., May 7, 2004, at 1 (copy on file with the *Santa Clara Law Review*).

50. In state court in California, the term “cross-complaint” includes the pleadings that in federal court would be called a “counterclaim,” a “cross-claim” and a “third-party claim.” *See* CAL. CIV. PROC. CODE §§ 428.10, 428.80; FED. R. CIV. P. 13(a), 13(g), 14.

51. *See* Answer to Unverified Complaint, Oak Prods., Inc. v. Ohio Disc. Merch., Inc., No. SC081563 (Los Angeles Super. Ct. filed May 27, 2004); Cross-Complaint for Declaratory Relief, Oak Prods., Inc. v. Ohio Disc. Merch., Inc., *supra* note 22.

52. *See* Notice of Removal, Oak Prods., Inc. v. Ohio Disc. Merch., Inc., *supra* note 47.

53. This amendment was not reflected in the Notice of Removal, but it is reflected in the settlement agreement. *See* Notice of Settlement and Request for Dismissal ¶ 1, Oak Prods., Inc. v. Ohio Disc. Merch., Inc., No. CV-04-3821 (C.D. Cal. filed July 30, 2004), in which the name “John Edgell” appears in the caption in place of John Doe No. 1.

54. *See* Complaint for Copyright Infringement ¶ 15, Fitness Prods., Inc. v.

THE SETTLEMENT

On July 30, 2004, Oak Productions filed a Notice of Settlement and Request for Dismissal in the district court.⁵⁵ In an accompanying press release, Oak Productions, Fitness, ODM, and the Bosleys announced that they had “amicably resolved” the two lawsuits.⁵⁶ According to the Press Release:

The parties have agreed that all Schwarzenegger dolls holding a gun will be permanently discontinued. ODM will be permitted to manufacture a new doll of Governor Schwarzenegger, without a gun, approved by Oak The parties have agreed that a substantial portion of all sales of both dolls (with and without a gun), will be donated to Schwarzenegger’s charity, Arnold’s All Stars. In addition, the Bosleys have agreed to donate a portion of Schwarzenegger doll sales to a charity of their choosing.⁵⁷

Edgell was not a party to the settlement agreement, and the claims against him were dismissed without prejudice.⁵⁸ Edgell publicly objected to the settlement,⁵⁹ and he is now selling (without authorization) an Arnold Schwarzenegger “girlie man” doll depicting the Governor wearing a pink dress and high heels.⁶⁰ No suit has been filed against Edgell’s new dolls. It is also unclear whether Schwarzenegger will be able to control resale of the original Bosley bobblehead dolls. It was reported that Schwarzenegger had registered with eBay to try to prevent resale of the Bosley dolls on the popular auction site,⁶¹ but on November 10, 2004, ten of the Bosley

Ohio Disc. Merch., Inc., No. CV-04-3965 (C.D. Cal. filed June 3, 2004); *see also* note 19, *supra*.

55. *See* Notice of Settlement and Request for Dismissal, Oak Prods., Inc. v. Ohio Disc. Merch., Inc., *supra* note 53.

56. *See* Press Release, *Schwarzenegger Companies Settle with Bobblehead Doll Company*, available at <http://www.thesmokinggun.com/archive/0802042bobble3.html> (last visited Mar. 17, 2005).

57. *Id.*

58. *See* Notice of Settlement and Request for Dismissal, Oak Prods., Inc. v. Ohio Disc. Merch., Inc., *supra* note 53.

59. *See* Calvin, *supra* note 34; Gledhill, *supra* note 3; Hudak, *supra* note 3; *Angry Doll Marketeer Threatens to Market Schwarzenegger Urinal Cakes*, AGENCE FRANCE-PRESSE, Aug. 13, 2004, available at 2004 WL 90097767.

60. *See* www.governorgirlieman.com (last visited Mar. 18, 2005); Margaret Talev, *This Time, Bobblehead of Governor Wears Pumps*, SACRAMENTO BEE, Sept. 9, 2004, at A3, available at 2004 WL 175513929.

61. Kevin Yamamura, *Governor’s Bobblehead Battle Rolls On—To eBay*, SACRAMENTO BEE, Aug. 25, 2004, at A3, available at 2004 WL 17581023.

Schwarzenegger dolls were listed for sale on eBay.⁶²

62. See <http://www.ebay.com> (visited Nov. 10, 2004). A search by the author of “completed items” showed that thirty dolls had been offered for sale on eBay during the previous two weeks, fifteen of which were sold. *Id.*