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16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA**
18 **SOUTHERN DIVISION**

19 NORTHLAND FAMILY PLANNING
20 CLINIC, INC.,

21 Plaintiff,

22 vs.

23 CENTER FOR BIO-ETHICAL
24 REFORM, *et al.*,

25 Defendants.

Case No.: 8:11-cv-00731-JVS-AN

**DEFENDANTS' STATEMENT OF
GENUINE DISPUTES PURSUANT
TO L.R. 56-2**

Date: June 4, 2012

Time: 1:30 pm

Courtroom: 10C

Hon. James V. Selna

Pursuant to L.R. 56-2, Defendants hereby submit the following response to Plaintiff's "Separate Statement of Uncontroverted Facts and Conclusions of Law."

**PLAINTIFF’S STATEMENT OF FACTS AND
DEFENDANTS’ RESPONSE**

1
2
3 1. Plaintiff’s Statement: Plaintiff Northland Family Planning Clinic, Inc.
4 (“Northland”) runs three family planning clinics in the greater Detroit area of
5 Michigan.

6 Defendants’ Response: Defendants do not dispute that Plaintiff runs three
7 abortion clinics in the greater Detroit area of Michigan. (*See* Defendants’
8 Statement of Uncontroverted Facts and Conclusions of Law [“DSMF”] at ¶ 1)¹

9 2. Plaintiff’s Statement: In late 2009, Northland created a video entitled
10 “Every Day, Good Women Choose Abortion” (the “Northland Video”).

11 Defendants’ Response: Defendants do not dispute that Plaintiff created the
12 Northland Video in 2009. (*See* DSMF at ¶ 2).

13 3. Plaintiff’s Statement: Northland created the Northland Video with the
14 intention that it be used as an outreach, counseling, and educational tool.

15 Defendants’ Response: Defendants do not dispute that Plaintiff has used—
16 and currently does use—the Northland Video for counseling and as an
17 educational tool to “de-stigmatize” abortion in the minds of its patients and in the
18 collective mind of the public. As Renee Chelian, Plaintiff’s witness designated
19 pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, further
20 testified, “certainly one of the reasons it’s posted on [Northland’s] website” is so
21 that Plaintiff can use it to “de-stigmatize” abortion. (DSMF at ¶¶ 3-9). Chelian
22

23
24 ¹ Defendants’ Statement of Uncontroverted Facts and Conclusions of Law (Doc.
25 No. 40-2) was previously filed in this case in support of Defendants’ motion for
summary judgment and is incorporated herein by reference and citation.

1 further testified that the Northland Video had no other purpose than to de-
2 stigmatize abortion. (Chelian Dep. at 36:21-37:4 at Ex. 1 attached).

3 4. Plaintiff's Statement: The Northland Video is a unique and innovative
4 work that tells women who have had or are considering having an abortion that
5 abortion is not uncommon and that they are good women regardless of the choice
6 they make.

7 Defendants' Response: Defendants dispute the claim that the Northland
8 Video is "unique and innovative" and note that the cited testimony does not
9 support Plaintiff's statement. Defendants further state that the cited testimony
10 makes plain that the purpose of the Northland Video is to "de-stigmatize"
11 abortion. (DSMF at ¶ 7, 9). Moreover, Plaintiff's designated "expert"²
12 acknowledged in her sworn testimony that there was nothing unique or creative
13 about the "goodness" narrative advanced by the Northland Video. (R.A. Dep. at
14 100 at Ex. 2 attached).

15 5. Plaintiff's Statement: Northland's founder, Renee Chelian, and her
16 employees spent considerable time and creative effort in drafting the script for the
17 Northland Video.

18 Defendants' Response: Defendants dispute Plaintiff's statement that Renee
19 Chelian and her employees "spent considerable time and creative effort" in
20

21 ² Defendants object to Plaintiff's designation of R.A. as an expert on any matter
22 relevant to this litigation, and indeed on any matter simply. However, R.A., as a
23 "good friend" and "colleague" with a long-standing "business association" with
24 Renee Chelian (R.A. Dep. at 76-77; 78; 102-04 at Ex. 2), and as someone familiar
25 with the "Good Woman" theme used in the Northland Video, testified that the
"Good Woman" narrative was not developed or created by Plaintiff. (R.A. Dep.
at 100 at Ex. 2).

1 developing the Northland Video in that the cited testimony does not support this
2 characterization. Moreover, Plaintiff's designated "expert" acknowledged in her
3 sworn testimony that there was nothing new or creative about the "goodness"
4 narrative advanced by the Northland Video, only that it was used in a video.
5 (R.A. Dep. at 100 at Ex. 2).

6 6. Plaintiff's Statement: Ms. Chelian said that "[t]he effort to de-stigmatize
7 abortion is the chance to talk about our own goodness and what kind of women
8 choose abortion services, the words that women tell us when they come into the
9 clinic, the things they write in journals that we have for them, to reclaim our own
10 goodness."

11 Defendants' Response: Defendants do not dispute Plaintiff's statement that
12 this is what Renee Chelian said.

13 7. Plaintiff's Statement: Northland's copyright is registered with the U.S.
14 Copyright Office.

15 Defendants' Response: Defendants assert that the document speaks for
16 itself.

17 8. Plaintiff's Statement: Northland posted the Good Women Video on its own
18 website and on the video sharing website YouTube in January 2010.

19 Defendants' Response: Defendants dispute that the citation stands for the
20 proposition asserted by Plaintiff. Nonetheless, Defendants do not dispute that
21 Plaintiff has posted and continues to post the Northland Video on the Internet for
22 the public, their clients, and other abortion clinics and their clients to view at no
23 cost and places no restriction on how and under what conditions the third-parties
24 may view or link the Northland Video or for what purposes. (DSMF at ¶¶ 4, 4, 9,
25 49-50).

1 9. Plaintiff's Statement: In January 2011, Defendant TAG, acting with and
2 through Holmberg, created a copy of the Northland Video.

3 Defendants' Response: Defendants deny that Eric Holmberg "created a
4 copy of the Northland Video." Defendants assert that Eric Holmberg made fair
5 use of portions of the Northland Video to create the TAG Video, which is a
6 critical parody of the Northland Video. (DSMF at ¶¶ 13-19, 56).

7 10. Plaintiff's Statement: In January 2011, Defendant TAG, acting with and
8 through Holmberg, made a video from footage taken from the Northland Video
9 ("TAG Video").

10 Defendants' Response: Defendants assert that Eric Holmberg made fair use
11 of portions of the Northland Video to create the TAG Video, which is a critical
12 parody of the Northland Video. (DSMF at ¶¶ 13-19, 56).

13 11. Plaintiff's Statement: The TAG Video is approximately two minutes long.

14 Defendants' Response: Defendants assert that the TAG Video speaks for
15 itself, and they further assert that the evidence cited by Plaintiff demonstrates that
16 Defendant TAG used approximately 1 minute of the Northland Video, which
17 itself exceeds 4 minutes, in TAG's video, which is approximately 2 minutes long.
18 (DSMF at ¶¶ 13-19, 56).

19 12. Plaintiff's Statement: The TAG Video incorporates approximately one
20 minute of images from the Northland Video.

21 Defendants' Response: Defendants assert that the TAG Video speaks for
22 itself, and they further assert that the evidence demonstrates that Defendant TAG
23 used approximately 1 minute of the Northland Video, which itself exceeds 4
24 minutes, in TAG's video, which is approximately 2 minutes long video. (DSMF
25 at ¶ 13-19, 56).

1 13. Plaintiff's Statement: The images in the TAG Video alternate between
2 images from the Northland Video and images that depict alleged abortions.

3 Defendants' Response: Defendant asserts that the TAG Video speaks for
4 itself. Defendants further assert that the TAG Video is a critical parody and thus
5 conjures up those parts of the Northland Video essential for this purpose since
6 parody emerges from the joinder of reference and ridicule. (*See* DSMF at ¶¶ 13-
7 19, 56).

8 14. Plaintiff's Statement: The TAG Video's audio is entirely made up of audio
9 from the Northland Video.

10 Defendants' Response: Defendant asserts that the TAG Video speaks for
11 itself and that because the TAG Video is a critical parody, it conjures up those
12 parts of the Northland Video, including its audio narrative, that are essential for
13 this purpose since parody emerges from the joinder of reference and ridicule.
14 (DSMF at ¶¶ 13-19, 56).

15 15. Plaintiff's Statement: The TAG Video uses the segments in the same order
16 as they appear in the Northland Video.

17 Defendants' Response: Defendants dispute this assertion in that the
18 Northland Video does not have segments depicting images of aborted babies.
19 (*Compare* DSMF at ¶ 2 [Northland Video] *with* ¶ 15 [TAG Video]).

20 16. Plaintiff's Statement: Northland's logo and a copyright mark remain
21 prominently displayed in the TAG Video.

22 Defendants' Response: Defendants assert that the TAG Video speaks for
23 itself and further assert that the TAG Video is a critical parody and thus conjures
24 up those parts of the Northland Video essential for this purpose since parody
25 emerges from the joinder of reference and ridicule. Specifically, the TAG Video

1 purposefully parodies and ridicules the very fact that Northland is the party
2 engaging in fraudulent misrepresentation and sought to copyright such fraud.
3 That is, the TAG Video is not attempting to make a generic statement regarding
4 abortion, but is rather parodying and criticizing Plaintiff's specific fraudulent
5 message and modality as expressed in the reference. (See DSMF at ¶¶ 13-19, 56).

6 17. Plaintiff's Statement: The TAG Video closes with the phone number for
7 Northland Family Planning superimposed on a still photo of alleged fetus parts.

8 Defendants' Response: Defendants assert that the TAG Video speaks for
9 itself and that Plaintiff's phone number is superimposed on a photo of actual fetus
10 parts. Defendants further assert that the TAG Video is a critical parody and thus
11 conjures up those parts of the Northland Video essential for this purpose since
12 parody emerges from the joinder of reference and ridicule. (DSMF at ¶¶ 13-19,
13 56).

14 18. Plaintiff's Statement: TAG and Holmberg uploaded the TAG Video to
15 YouTube on or around January 7, 2011.

16 Defendants' Response: Defendants dispute that the evidence cited by
17 Plaintiff states that the TAG Video was uploaded on YouTube on or around
18 January 7, 2011. Defendants further assert that Eric Holmberg uploaded the TAG
19 Video on the private side of his YouTube channel; therefore, neither TAG nor
20 Holmberg ever made the TAG Video available to the public for viewing. (DSMF
21 at ¶¶ 15-16).

22 19. Plaintiff's Statement: Mr. Holmberg emailed the link to the TAG Video to
23 an unknown number of persons, including Defendant Gregg Cunningham
24 ("Cunningham").

1 Defendants’ Response: Defendants dispute Plaintiff’s statement in that it
2 mischaracterizes the testimony. In his deposition, Eric Holmberg stated, “My
3 recollection again was that I sent it to Greg, and Greg alone, but it’s possible that
4 a few other friends and close collaborators—I might have sent this to them as
5 well. I don’t recall.” Holmberg further stated that he only recalls sending the link
6 to one other person in addition to Gregg Cunningham. (Holmberg Dep. at 45:17-
7 20; 55:3-16).

8 20. Plaintiff’s Statement: The TAG Video was posted to a high-traffic anti-
9 abortion blog called JillStanek.com on January 7, 2011.

10 Defendants’ Response: Defendants deny Plaintiff’s assertion of fact in that
11 it is not supported by the proffered evidence. The cited printout describes a video
12 produced by CBR, not TAG. Moreover, the TAG Video was only ever posted by
13 Eric Holmberg on the private side of his YouTube channel, and YouTube
14 immediately took it down. (DSMF at ¶¶ 15-16).

15 21. Plaintiff’s Statement: Cunningham directed Defendant Don Cooper
16 (“Cooper”) to post the TAG Video to the home page of Defendant CBR’s
17 website.

18 Defendants’ Response: Defendants assert that the document (email
19 message) speaks for itself. However, the evidence shows that the TAG Video
20 was immediately removed from YouTube; therefore, it was never posted on
21 CBR’s website. (DSMF at ¶¶ 16, 34).

22 22. Plaintiff’s Statement: In January 2011, Cunningham, acting on behalf of
23 CBR, directed a contractor to make a video using the Northland Video.

24 Defendants’ Response: Defendants admit that Gregg Cunningham, on
25 behalf of CBR, directed the creation and production of the CBR Video.

1 Defendants further assert that the evidence presented by Plaintiff further shows,
2 without contradiction, that Defendants' purpose was to create "a parody video,"
3 and that Cunningham used his own creativity and innovation to produce CBR's
4 parody video, which itself is a creative work. (Wilcox Decl. at Ex. L; *see also*
5 DSMF at ¶¶ 23, 25, 37-45, 47, 57).

6 23. Plaintiff's Statement: Cooper helped the contractor to get a copy of the
7 Northland Video.

8 Defendants' Response: Defendants admit that Donald Cooper provided
9 some assistance with the CBR Video and that at all times he was working under
10 the supervision and direction of Gregg Cunningham and that he, Donald Cooper,
11 did not have the right and ability to direct, control, or supervise any infringing
12 activity. (DSMF at ¶¶ 25-26).

13 24. Plaintiff's Statement: Cunningham said that a video based around the
14 Northland Video would be "a classic" and "worth its weight in gold."

15 Defendants' Response: Defendants dispute Plaintiff's characterization of
16 the facts. The evidence shows that Gregg Cunningham stated that the CBR
17 "parody video" would "become a classic" and that bringing this "concept" for the
18 video to his attention "is potentially worth its weight in gold"—a figure of speech
19 used to convey the sentiment that the concept was exceedingly creative, if not
20 brilliant.

21 25. Plaintiff's Statement: The resulting video ("January 25 Video") is primarily
22 composed of unaltered footage from the Northland Video, plus an opening screen
23 citing a bible verse, images of alleged abortions, and a sample of a song called
24 "Natural One."

1 Defendants’ Response: Defendants dispute Plaintiff’s characterization of
2 the CBR “parody video.” Defendants assert that the CBR Video speaks for itself.
3 Moreover, the evidence presented by Plaintiff (Exhibit L to the Wilcox
4 Declaration) further illustrates the transformative nature of the CBR Video. As
5 the undisputed evidence shows, the CBR Video transforms the Northland Video
6 by adding graphic images of aborted fetuses to certain parts of the video, a jarring
7 music score, a scripture citation to 2 Corinthians 11:13-14, which warns viewers
8 that Satan masquerades as “an angel of light,” and an introduction quoting George
9 Orwell, which condemns the use of lies to obscure murder, so as to criticize,
10 comment upon, disparage, parody, mock, and disagree with the message
11 conveyed by the Northland Video. (DSMF at ¶¶ 40-44). The CBR Video
12 criticizes, comments upon, disparages, parodies, mocks, and disagrees with both
13 the deceptive message and the deceptive manner of Northland’s staffer who
14 narrates the Northland Video. According to Defendants and commonsense,
15 Northland’s consistent theme that abortion is “normal” and in every instance and
16 circumstance a “good” thing always sought by a “good woman” is patently false.
17 Every aspect of the staffer’s attire, demeanor, syntax, and intonation is calculated
18 to reinforce this deception. The same is true with the flowers on her desk, the soft
19 background music, and the framed art on her walls. CBR’s Video comments
20 upon, disparages, parodies, mocks, and rebuts all this duplicity with an accusatory
21 literary quote in its introduction, jarring music in its score, and graphic imagery in
22 its video refutation. (DSMF at ¶ 47). Plaintiff admits that Defendants’ videos
23 “changed,” “ruined,” and “distort” “every bit” of the intent, meaning, and
24 message of the Northland Video. (DSMF at ¶ 41). Plaintiff admits that the
25 purpose of its video was to “de-stigmatize” abortion, while Defendants’ videos

1 plainly “stigmatize” abortion and seek to “shame and anger and disgust anyone
2 who’s watching [them].” (DSMF at ¶ 42). Plaintiff admits that Defendants’
3 videos “ruined” and “changed” “every bit” of the intent, meaning, and message of
4 the Northland Video by, *inter alia*, “add[ing] shame and sickening images” of
5 abortion and by “add[ing] music, other words and footage.” (DSMF at ¶¶ 41-44).

6 26. Plaintiff’s Statement: The January 25 Video uses the segments of the
7 Northland Video in their original order, and Cunningham’s written instructions
8 suggest sequential intercutting of existing videos, with no conscious editorial
9 choice to pair certain abortion footage with certain parts of the Northland Video.

10 Defendants’ Response: Defendants dispute Plaintiff’s assertion in that it
11 mischaracterizes and misstates the evidence. Contrary to Plaintiff’s assertion, the
12 cited exhibit plainly shows that considerable thought and “editorial choice” went
13 into the creation of the CBR Video to ensure that it was a highly effective parody,
14 which it is. In fact, the CBR Video is itself a creative work, as the evidence cited
15 by Plaintiff demonstrates. (Wilcox Decl. at Ex. L; *see also* DSMF at ¶¶ 40, 57).

16 27. Plaintiff’s Statement: Northland’s logo and a copyright mark remain
17 prominently displayed in the January 25 Video.

18 Defendants’ Response: Defendants do not dispute that the Northland logo
19 and copyright mark appear on the CBR Video. However, Defendants also assert
20 that “Center for Bio-Ethical Reform” and CBR’s website, “abortionNo.org,” are
21 prominently displayed on the CBR Video, as Plaintiff’s evidence shows, and thus
22 leave no doubt as to who created the video. (DSMF at ¶ 25).

23 28. Plaintiff’s Statement: Defendant Seth Gruber (“Gruber”), acting on behalf
24 of CBR and at the direction of Cunningham and Cooper, posted the January 25
25 Video to a website called Pro-LifeTube.com on or around January 25, 2011.

1 Defendants' Response: Defendants dispute Plaintiff's characterization of
2 the evidence. The undisputable evidence shows that Seth Gruber was acting at all
3 times relevant here under the direction, supervision, and control of Gregg
4 Cunningham. Gruber did not have any authority to act unilaterally or
5 independently on behalf of CBR. He had no right or ability to direct, control or
6 supervise any of the activity related to the CBR Video. (DSMF at ¶¶ 25-26).

7 29. Plaintiff's Statement: Bullis owned and operated Pro-Lifetube.com at the
8 time the infringing videos were uploaded.

9 Defendants' Response: Defendants do not dispute that Todd Bullis was, at
10 one time, the owner of Pro-Lifetube.com. Defendants further assert that Bullis
11 sold the website to CBR around the time that Plaintiff sent a letter claiming that
12 the CBR Video posted on the website violated Plaintiff's copyright. (DSMF at ¶¶
13 27-32).

14 30. Plaintiff's Statement: Subsequently, Cunningham directed the contractor to
15 add a quote from George Orwell to the January 25 Video, creating the January 27
16 Video.

17 Defendants' Response: Defendants assert that Gregg Cunningham directed
18 that a George Orwell quote be added to the CBR Video, which is a critical parody
19 of the Northland Video. (*See also* DSMF at ¶¶ 25, 40).

20 31. Plaintiff's Statement: Gruber, acting on behalf of CBR and at the direction
21 of Cunningham, posted the January 27 Video to Pro-LifeTube.com.

22 Defendants' Response: Defendants dispute Plaintiff's characterization of
23 the evidence. The undisputable evidence shows that Seth Gruber was acting at all
24 times relevant here under the direction, supervision, and control of Gregg
25 Cunningham. Gruber did not have any authority to act unilaterally or

1 independently on behalf of CBR. He had no right or ability to direct, control, or
2 supervise any of the activity related to the CBR Video, including posting the
3 video on any website. (DSMF at ¶¶ 25, 26).

4 32. Plaintiff's Statement: Gruber also posted embedded links to the January 27
5 Video in at least three places on the CBR website ("CBR Blog Video," "CBR
6 Audio/Video Page Video," "CBR Standalone Video") and included a thumbnail
7 link on the CBR homepage ("CBR Homepage Video").

8 Defendants' Response: Defendants do not dispute that pursuant to the
9 direction, control, and supervision of Gregg Cunningham, who was acting on
10 behalf of CBR, Seth Gruber embedded links to the CBR Video on the CBR
11 website. (See also DSMF at ¶ 26).

12 33. Plaintiff's Statement: In posting the embedded links to the January 27
13 Video, Gruber created two additional versions of the Video that are available for
14 download on their own separate pages on CBR's website ("CBR Quicktime
15 Video" and "CBR WMP Video," collectively with the January 25 Video, January
16 27 Video, CBR Blog Video, CBR Audio/Video Page Video, and CBR Standalone
17 Video, the "CBR Videos").

18 Defendants' Response: Defendants dispute Plaintiff's statement, which is
19 not supported by the evidence. Seth Gruber did not create two additional versions
20 of the CBR Video. Moreover, Gruber did not have any authority to act
21 unilaterally or independently on behalf of CBR. He had no right or ability to
22 direct, control, or supervise any of the activity related to the CBR Video,
23 including producing additional versions of the video. (DSMF at ¶ 26).

1 34. Plaintiff's Statement: Neither CBR nor any of the individual defendants
2 sought permission to use the Northland Video or the music in any of the CBR
3 Videos.

4 Defendants' Response: Defendants assert that they did not seek permission
5 from Plaintiff to make fair use of portions of the Northland Video to produce their
6 videos because such permission is not required. Defendants further assert that
7 they had permission as a matter of law to use portions of the Northland Video to
8 produce their videos under 17 U.S.C. § 107. Defendants' assertions are supported
9 by the evidence cited by Plaintiff. (*See also* DSMF at ¶¶ 18-19, 23, 40, 56).

10 35. Plaintiff's Statement: Defendants have admitted that the CBR Videos
11 contain approximately 2 minutes and 2 seconds of the original 4 minute, 41
12 second Northland Video, or 43% of the original.

13 Defendants' Response: Defendants assert that the evidence shows that
14 CBR used 2 minutes and 2 seconds of the Northland Video's 4 minutes and 41
15 seconds of footage in CBR's 4 minute and 13 second video. Thus, less than half
16 of the CBR Video is comprised of content taken from the Northland Video. This
17 percentage is the content quantum minimally required to meaningfully criticize,
18 comment upon, disparage, parody, and rebut the most deceptive elements of
19 Northland's most misleading advertising claims. (DSMF at ¶¶ 25, 52).

20 36. Plaintiff's Statement: The CBR Videos are each just over four minutes
21 long, so the Northland Video footage accounts for approximately half of the CBR
22 Videos.

23 Defendants' Response: Defendants assert that the evidence shows that
24 CBR used 2 minutes and 2 seconds of the Northland Video's 4 minutes and 41
25 seconds of footage in CBR's 4 minute and 13 second video. Thus, less than half

1 of the CBR Video is comprised of content taken from the Northland Video. This
2 percentage is the content quantum minimally required to meaningfully criticize,
3 comment upon, disparage, parody, and rebut the most deceptive elements of
4 Northland's most misleading advertising claims. (DSMF at ¶¶ 25, 52).

5 37. Plaintiff's Statement: Each place on the CBR website where a CBR Video
6 is posted has a link to a donation page.

7 Defendants' Response: Defendants dispute Plaintiff's statement in that it
8 mischaracterizes the evidence. As the evidence shows, the donate links on CBR's
9 website are generic requests for donations, similar to most nonprofit websites, and
10 are neither tied to nor directed toward the CBR Video. CBR has no commercial
11 purpose for the CBR Video. (DSMF at ¶¶ 45-46).

12 38. Plaintiff's Statement: CBR has sent multiple appeal letters and newsletters
13 that publicize the CBR Videos while soliciting donations.

14 Defendants' Response: Defendants dispute Plaintiff's statement in that it
15 mischaracterizes the evidence. Defendants have not done any direct fundraising
16 so as to benefit financially from the CBR Video. (DSMF at ¶¶ 45-46). Any
17 requests for funding directly related to the CBR Video was a request to help defer
18 the costs of defending against this frivolous lawsuit. (DSMF at ¶¶ 45-46).

19 39. Plaintiff's Statement: "Every time" Cunningham meets with potential
20 donors, he shows them at least one of the CBR Videos.

21 Defendants' Response: Defendants dispute Plaintiff's statement in that it
22 mischaracterizes the evidence. Gregg Cunningham testified as follows: "Q. Did
23 CBR show any version of the 'angel of light' video at any group meetings? A.
24 Every chance we get. Everywhere we go." (Cunningham Dep. at 134:3-5).
25 "Every time I do a fundraising pitch I show the 'angel of light' video." "Q. And

1 why do you do that? A. Because it's part of what we are doing and because
2 we've been sued by a high net worth rapacious abortion provider and that lawsuit
3 is—is a burden to us financially and so we—quite naturally, if we're going to
4 mount a defense that—that allows us to exercise our rights of defense, we've got
5 to be able to raise the fund that it takes to do that.” (Cunningham Dep. at 156:7-
6 16; *see also* 156:17-157:10; DSMF at ¶¶ 45-46).

7 40. Plaintiff's Statement: On March 18, 2011, Northland's counsel sent letters
8 to Bullis as owner of ProLifetube.com, and to Cunningham and Cooper as
9 director and manager of CBR, informing Defendants of the infringing nature of
10 the CBR Videos and demanding that the CBR Videos, and any similar videos, be
11 removed from their websites.

12 Defendants' Response: Defendants do not dispute that Plaintiff's counsel
13 sent the subject letters. Defendants further assert that CBR and Gregg
14 Cunningham, through counsel, responded by informing Plaintiff's counsel that
15 any use of the Northland Video by any Defendant was plainly “fair use.”
16 (Answer to Am. Compl. at ¶¶ 48-49).

17 41. Plaintiff's Statement: Bullis did not respond to the demand nor remove the
18 CBR Videos.

19 Defendants' Response: Defendants do not dispute Plaintiff's statement.
20 Defendants further assert that Todd Bullis did not remove the CBR Video
21 because he sold the website to CBR and thus no longer had control over the
22 website. (DSMF at ¶¶ 27-32).

23 42. Plaintiff's Statement: CBR sent a reply through counsel refusing to remove
24 the CBR Videos.

1 Defendants’ Response: Defendants assert that CBR and Gregg
2 Cunningham, through counsel, responded to Plaintiff’s threat to file a frivolous
3 lawsuit stating, “The purpose of this letter is to inform you that your March 18,
4 2011, letter threatening legal action against our clients for exercising their
5 constitutionally and statutorily protected right to freedom of speech is both wrong
6 and futile.” The letter further describes Defendants’ fair use defense. (Answer to
7 Am. Compl. at ¶¶ 48-49).

8 43. Plaintiff’s Statement: In 2010, Northland had discussions with individuals
9 at other clinics, including [C.K.] and [E.B.], about permitting those clinics to use
10 the Northland Video or create custom versions of it.

11 Defendants’ Response: Defendants dispute this statement in that it grossly
12 misrepresents the facts and it offers self-serving opinions as a substitute for facts.
13 Renee Chelian testified about these discussions as follows: “Q. And what was the
14 substance of those discussions with [E.B.]? A. How to use – how she would use
15 the video for her patients. A. And was there any discussion about the price she
16 would be paying for the video? A. No. . . . Q. Was there any discussion with
17 [E.B.] regarding any of the terms of a sale of the video to her? . . . A. No.”

18 (Chelian Dep. at 39:14-25 at Ex. 1). “Q. Did any of these discussions with these
19 unnamed individuals include discussions of how much you would charge for
20 licensing [the Northland Video]? A. No. . . . Q. Did you discuss an actual license
21 agreement with these individuals? A. I think you’ve already asked me that and I
22 think I said no. Q. So you simply had discussions with individuals about using
23 the video, but it never included a discussion about a licensing agreement? A.
24 No.” (Chelian Dep. at 104:20-23; 105:4-11; *see also* 102:23-25; 103:1-2, 5-12;
25 106:12-18 at Ex. 1).

1 44. Plaintiff's Statement: However, after [C.K.] and [E.B.] became aware of
2 the Infringing Videos, they were no longer interested in using the Northland
3 Video.

4 Defendants' Response: Defendants dispute Plaintiff's statement in that
5 C.K. has not provided any testimony in this matter whatsoever and the assertions
6 set forth in E.B.'s declaration are self-serving and contradicted by the facts in that
7 Plaintiff never had any substantive discussions about, or interest in, selling or
8 licensing the derivative use of the Northland Video, and Plaintiff continues to use
9 the video as a counseling and educational tool. (*See* DSMF at ¶ 4). E.B.'s
10 assertions lack any credibility in that they are transparently fabricated for
11 purposes of this lawsuit. (*See, e.g.*, Chelian Dep. at 38:16-17; 39:14-25; 42:3-16;
12 102:23-25; 103:1-2, 5-12; 104:20-23; 105:4-11; 106:12-18 at Ex. 1) (admitting
13 that Northland never sold or licensed the Northland Video, never had any
14 discussions about any of the essential or even non-essential terms of a sales or
15 licensing agreement, such as the price at which Plaintiff might be willing to sell
16 or license the Northland Video or the price the supposed purchasers or licensees
17 might be willing to pay to acquire the rights to the Northland Video; and
18 moreover, Plaintiff never had any discussions regarding any of the other terms of
19 a sale or license of the Northland Video). Most tellingly, there was not a single
20 email, letter, note, or draft of any discussion whatsoever of the use, much less the
21 sale or license, of the Northland Video by C.K. or E.B., or any third-party prior to
22 the appearance of Defendants' videos, much less any kind of an agreement from
23 Plaintiff to any third party. (Chelian Dep. at 42:3-16 at Ex. 1). Indeed, according
24 to Plaintiff's own documents, the only interest expressed in a writing to actually
25 use the Northland Video occurs only after the CBR Video is produced and

1 published and only after Plaintiff and its colleagues became aware of the video.
2 (Muisse Decl., Ex. A [NFP_000038] at Ex. 3). The final blow to this fabrication’s
3 legal relevance is the fact that one of Renee Chelian’s own colleagues reassures
4 her after the CBR Video is posted that there is no likelihood that any reasonable
5 person would confuse Plaintiff’s “Good Woman” messaging with the CBR
6 Video. (Muisse Decl., Ex. A [NFP_000048-B] at Ex. 3). And the reason is
7 patently obvious: Defendants’ videos turn the “Good Woman” narrative on its
8 head and are so clearly a transformative critique of the reference work that they
9 stand as the quintessential exemplar of the power of parody and the propriety of
10 fair use. (*See* DSMF at ¶¶ 15, 18-19, 25, 40).

11 45. Plaintiff’s Statement: In addition, Ms. Chelian had planned to use the
12 Northland Video at speaking engagements and seminars but determined that the
13 existence of the Infringing Videos prevented her from doing so.

14 Defendants’ Response: Defendants dispute this self-serving statement in
15 that it is contradicted by the fact that to this day Plaintiff posts the Northland
16 Video on its website and on YouTube to convey its pro-abortion message to the
17 public and to potential clients, and it uses the Northland video to counsel its
18 clients. (DSMF at ¶¶ 3-4, 49-50). Moreover, one of Renee Chelian’s own
19 colleagues reassures her after the CBR Video is posted that there is no likelihood
20 that any reasonable person would confuse Plaintiff’s “Good Woman” messaging
21 with the CBR Video. (Muisse Decl., Ex. A [NFP_000048-B] at Ex. 3). And the
22 reason is patently obvious: Defendants’ videos turn the “Good Woman” narrative
23 on its head and are so clearly a transformative critique of the reference work that
24 they stand as the quintessential exemplar of the power of parody and the propriety
25 of fair use. (*See* DSMF at ¶¶ 15, 18-19, 25, 40).

1 46. Plaintiff's Statement: Holmberg admitted that he copied the Northland
2 Video by capturing it from YouTube.

3 Defendants' Response: Defendants dispute Plaintiff's characterization of
4 the evidence it cites. Defendants further assert that Eric Holmberg used portions
5 of the Northland Video to create the TAG Video, a critical parody of the
6 Northland Video, for nonprofit, noncommercial, educational, and parodic
7 purposes. (DSMF at ¶¶ 13-19, 56).

8 47. Plaintiff's Statement: Holmberg admitted editing the copy of the Northland
9 Video by combining approximately half of it—including its “most pertinent
10 minutes”—with images of alleged abortions.

11 Defendants' Response: Defendants dispute Plaintiff's characterization of
12 the evidence it cites in that the evidence demonstrates that Defendant Holmberg
13 *created* the TAG Video (Holmberg Dep. Ex. 39), which was a separately created
14 work that made fair use of portions of the Northland Video. (DSMF at ¶¶ 15, 19).

15 48. Plaintiff's Statement: Holmberg posted the unauthorized derivative work
16 on YouTube.

17 Defendants' Response: Defendants dispute Plaintiff's statement because it
18 is an inaccurate representation of the evidence (*i.e.*, that Holmberg posted an
19 “unauthorized derivative work”). Rather, the evidence demonstrates that Eric
20 Holmberg posted the TAG Video—which was a separately created work that
21 made fair use of portions of the Northland Video—on the private side of his
22 YouTube channel. Consequently, at no time did Holmberg make the TAG Video
23 available to the public for viewing. (DSMF at ¶¶ 13-16, 19).

1 49. Plaintiff's Statement: Cooper worked with other CBR employees to copy
2 the Northland Video from Northland's post on YouTube and saved an
3 unauthorized copy to CBR's server, "Adam."

4 Defendants' Response: Defendants dispute Plaintiff's statement in that it
5 mischaracterizes the evidence (*i.e.*, that Cooper saved an "unauthorized copy" of
6 the Northland Video). Rather, the evidence demonstrates that the Northland
7 Video was available to the public on the Internet and that Defendants' use of the
8 Northland Video was not "unauthorized" as a matter of federal law under the fair
9 use doctrine (17 U.S.C. § 107). (DSMF at ¶¶ 3, 18, 40, 49, 50, 56).

10 50. Plaintiff's Statement: At Cunningham's direction, CBR created at least
11 two unauthorized works derivative of the Northland Video.

12 Defendants' Response: Defendants dispute Plaintiff's statement in that it
13 misrepresents the facts (*i.e.*, that CBR created "two unauthorized works derivative
14 of the Northland Video"). Rather, the evidence demonstrates that the Northland
15 Video was available to the public on the Internet, and that Defendants' use of the
16 Northland Video was not "unauthorized" as a matter of federal law under the fair
17 use doctrine (17 U.S.C. § 107). (DSMF at ¶¶ 3, 18, 40, 49, 50, 56).

18 51. Plaintiff's Statement: CBR made copies of the modified videos by
19 uploading them to Pro-Lifetube.com, made copies available for download from
20 CBR's own website, and linked to these videos from at least six different
21 locations on the internet.

22 Defendants' Response: Defendants do not dispute that the CBR Video,
23 which made fair use of portions of the Northland Video, was and remains posted
24 on various locations on the Internet, including CBR's website and Pro-

1 LifeTube.com. (*See also* DSMF at ¶ 39) (stating that the CBR Video is not made
2 available for sale or download).

3 52. Plaintiff's Statement: Bullis admitted to uploading a copy of at least one of
4 the Infringing Videos to Pro-Lifetube.com and reconfiguring the resolution of an
5 Infringing Video.

6 Defendants' Response: Defendants dispute Plaintiff's statement in that it
7 mischaracterizes the evidence. Todd Bullis stated in the cited evidence that he
8 "did not change the resolution at all." As the evidence shows, Bullis had no part
9 in the creation of the CBR Video. (DSMF at ¶ 27).

10 53. Plaintiff's Statement: Bullis owned and operated Pro-Lifetube.com at the
11 time the Infringing Videos were uploaded.

12 Defendants' Response: Defendants do not dispute that Todd Bullis owned
13 Pro-LifeTube.com at the time the CBR Video was first uploaded to the website.
14 However, Defendants further assert that Bullis sold the website to CBR shortly
15 after the video was posted, and thus he has no control over the website or the
16 posting of the CBR Video. (DSMF at ¶¶ 29-32).

17 54. Plaintiff's Statement: Bullis admitted to editing thumbnails of the
18 Infringing Videos and to viewing portions of the Infringing Videos.

19 Defendants' Response: Defendants do not dispute that Todd Bullis "briefly
20 watched parts of the video after [he] heard about it." (Bullis Dep. at 56:12-13).
21 Defendants further assert that the evidence cited shows that Bullis was asked if he
22 could edit a "thumbnail" for the CBR Video. Bullis did not create or produce the
23 CBR Video nor did he contribute in any way to the creation or production of this
24 video. (DSMF at ¶ 27).

1 55. Plaintiff's Statement: The Infringing Videos contain Northland's
2 conspicuous copyright notice.

3 Defendants' Response: Defendants do not dispute that the Northland
4 copyright mark appears on the CBR Video. However, Defendants also assert that
5 "Center for Bio-Ethical Reform" and CBR's website, "abortionNo.org," are
6 prominently displayed on the CBR Video and leave no doubt as to who created
7 the CBR Video. (DSMF at ¶ 25).

8 56. Plaintiff's Statement: Moreover, Bullis knew of the infringement at least as
9 of the date he received Northland's March 18, 2011 DMCA takedown notice.

10 Defendants' Response: Defendants dispute Plaintiff's statement in that it is
11 not supported by the evidence. Defendants assert that because fair use is not a
12 copyright infringement as a matter of law, Todd Bullis never "knew" of any
13 "infringement." Furthermore, at best, the evidence cited, Exhibit W to the
14 Wilcox declaration, simply sets forth an incorrect *allegation* of infringement by
15 Plaintiff. (*See also* DSMF at ¶ 28).

16 57. Plaintiff's Statement: Despite this knowledge, Bullis did nothing to
17 remove the Infringing Videos from his website or to prevent further infringement.

18 Defendants' Response: Defendants dispute Plaintiff's statement in that it is
19 not supported by the evidence. Defendants assert that because fair use is not a
20 copyright infringement as a matter of law, Todd Bullis never had "knowledge" of
21 any "infringement." Moreover, Bullis sold the Pro-LifeTube.com website to
22 CBR and thus had not authority or control over the website. (DSMF at ¶¶ 27-32).

23 58. Plaintiff's Statement: Bullis did not adopt or implement any infringement
24 policies as required by 17 U.S.C. § 512(i).

1 Defendants’ Response: Defendants dispute Plaintiff’s statement in that
2 Todd Bullis testified that he had a policy of not permitting the posting of any
3 material that would “break the law” and that all uploaded videos must be lawful.
4 (Bullis Dep. at 29:14-25; 34:11-35:22). In addition, Plaintiff’s “statement of fact”
5 is in fact an incomplete statement of the law. Section 512(i) does not “require”
6 anything. It is a safe harbor provision that precludes liability if its conditions are
7 met. Failure to follow these conditions does not create liability or a violation of
8 copyright law. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109 (9th Cir.
9 2007) (stating that “nothing in the language of § 512 indicates that the limitation
10 on liability described therein is exclusive”). Further, nothing in the record
11 evidences that Bullis does not qualify under the § 512(i) safe harbor provision.
12 (Bullis Dep. at 29:14-25; 34:11-39:9); *see also Perfect 10, Inc.*, 488 F.3d at 1109
13 (“The statute does not define ‘reasonably implemented.’ We hold that a service
14 provider ‘implements’ a policy if it has a working notification system, a
15 procedure for dealing with DMCA-compliant notifications, and if it does not
16 actively prevent copyright owners from collecting information needed to issue
17 such notifications.”). One, based on the record cited by Plaintiff, it is evident that
18 Plaintiff successfully provided Bullis with a “take down notice,” and without any
19 difficulty, thereby evidencing a “working notification system.” Two, the record
20 cited herein by Plaintiff evidences “a procedure for dealing with DMCA-
21 compliant notifications” (*i.e.*, the statute does not require the publication of the
22 procedures prior to receipt of the take-down notification). And three, there is
23 nothing in the record even suggesting that Bullis “prevent[ed] copyright owners
24 from collecting information needed to issue such notifications.” In fact, Bullis
25 posted the CBR Video, which included, when viewed by the public, the name of

1 the publishing party, CBR, and CBR's website address, abortionNo.org. (See
2 DSMF at ¶ 25 [CBR Video]). There is nothing in the record to suggest that
3 Plaintiff had any difficulty determining who needed to be provided the take-down
4 notification and how to contact them. Defendants further assert that because the
5 CBR Video made fair use of the Northland Video, there was no copyright
6 infringement as a matter of law, and thus Bullis acted appropriately under all the
7 relevant statutory provisions. (See DSMF at ¶¶ 28-30; see also ¶ 32
8 [demonstrating that Bullis sold his website shortly after receiving Plaintiff's
9 letter]).

10 59. Plaintiff's Statement: Defendants assert that they are making "fair use" of
11 the Northland Video.

12 Defendants' Response: Defendants do not dispute the fact that their videos
13 made "fair use" of the Northland Video.

14 60. Plaintiff's Statement: Defendant Gregg Cunningham openly admitted in
15 his deposition that he shows the Infringing Videos "[e]very time [he] do[es] a
16 fundraising pitch," "[e]very chance [he] get[s]," and "[e]verywhere [he] go[es]."

17 Defendants' Response: Defendants dispute Plaintiff's statement in that it
18 mischaracterizes the evidence. Gregg Cunningham testified as follows: "Q. Did
19 CBR show any version of the 'angel of light' video at any group meetings? A.
20 Every chance we get. Everywhere we go." (Cunningham Dep. at 134:3-5).
21 "Every time I do a fundraising pitch I show the 'angel of light' video." "Q. And
22 why do you do that? A. Because it's part of what we are doing and because
23 we've been sued by a high net worth rapacious abortion provider and that lawsuit
24 is—is a burden to us financially and so we—quite naturally, if we're going to
25 mount a defense that—that allows us to exercise our rights of defense, we've got

1 to be able to raise the funds that it takes to do that.” (Cunningham Dep. at 156:7-
2 16; *see also* 156:17-157:10; *see also* DSMF at ¶¶ 45-46).

3 61. Plaintiff’s Statement: Defendant Gruber publicized the Infringing Videos
4 by posting links to Twitter and CBR’s Blog.

5 Defendants’ Response: Defendants do not dispute that pursuant to the
6 direction, supervision, and control of Gregg Cunningham, who was acting on
7 behalf of CBR, Seth Gruber posted links to the CBR Video on Twitter and CBR’s
8 blog. (*See* DSMF at ¶¶ 26, 39).

9 62. Plaintiff’s Statement: Communications and fundraising appeals sent by
10 CBR discuss and publicize the Infringing Videos while also soliciting donations.

11 Defendants’ Response: Defendants dispute Plaintiff’s statement in that it
12 mischaracterizes the facts. CBR has not directly solicited donations for the CBR
13 Video. Any requests for donations remotely related to the video were made after
14 Northland filed this lawsuit and for the sole purpose of helping CBR defray the
15 costs associated with this litigation. (DSMF at ¶¶ 45-46; *see also* Cunningham
16 Dep. at 156:7-16; *see also* 156:17-157:10).

17 63. Plaintiff’s Statement: The CBR Videos are posted on websites with
18 prominent “Donate” links and the videos themselves feature links to Defendants
19 CBR’s and TAG’s websites, which both feature the ability to electronically
20 donate.

21 Defendants’ Response: Defendants dispute Plaintiff’s statement in that it
22 mischaracterizes the evidence. As the evidence shows, the donate links on CBR’s
23 website are generic requests for donations, similar to most nonprofit websites, and
24 are not tied to nor directed toward the CBR Video. CBR has no commercial
25 purpose for the CBR Video. (DSMF at ¶¶ 37, 45-46).

1 64. Plaintiff's Statement: Defendants in this case stood to gain publicity and to
2 win converts to their point of view.

3 Defendants' Response: Defendants dispute Plaintiff's statement in that it is
4 not supported by the evidence, and it is contradicted by the testimony of Gregg
5 Cunningham. (See DSMF at ¶¶ 37, 45-46).

6 65. Plaintiff's Statement: Defendants who are salaried employees of or
7 volunteers for Defendant CBR stood to aid the financial well-being of the
8 organization for which they worked.

9 Defendants' Response: Defendants dispute Plaintiff's statement. First, the
10 record citation by Plaintiff refers only to Todd Bullis and not to any "salaried
11 employees." Second, Bullis was not a salaried employee of CBR, and with
12 regard to receiving any financial benefit, he stated that he didn't have any such
13 goals and that he "didn't think about that." Third, the actual citation to the record
14 by Plaintiff evidences that Bullis was simply returning a "favor" in that CBR is
15 "so nice to me." These statements evidence the opposite of a financial *quid pro*
16 *quo* or benefit and speaks to a relationship of civility and camaraderie in common
17 cause. Fourth, there was no financial goal or incentive for CBR or the other
18 Defendants to produce the CBR Video. And, fifth, aside from simply presenting
19 a concept, Eric Holmberg had nothing to do with the CBR Video. (See also
20 DSMF at ¶ 24, 26, 27).

21 66. Plaintiff's Statement: Defendants copied without modification the
22 Northland Video's most creative elements.

23 Defendants' Response: Defendants dispute Plaintiff's statement. As
24 demonstrated in the evidence cited by Plaintiff, Defendants used those segments
25 of the Northland Video that were most pertinent to the "goodness" narrative they

1 wanted to parody. Further, Defendants’ videos specifically criticize, comment
2 upon, disparage, parody, mock, and disagree with both the deceptive message and
3 the deceptive manner of Plaintiff’s staffer who narrates the Northland Video.
4 And that deception is, according to Defendants, Plaintiff’s consistent lie that
5 abortion is “normal” and causes no harm, and Plaintiff’s misrepresentation to
6 young vulnerable women that “when a woman decides to have an abortion in all
7 circumstances and at all times, she is making a choice that is thoughtful,
8 considered, and essentially coming from a place of goodness.” Moreover,
9 Defendants’ videos are critical parodies and thus conjure up those parts of the
10 Northland Video essential for this purpose since parody emerges from the joinder
11 of reference and ridicule. (DSMF at ¶¶ 13-19, 37-44, 47-48, 56).

12 67. Plaintiff’s Statement: Defendants appropriated the Northland Video as
13 representative of the pro-choice side of a “debate.”

14 Defendants’ Response: Defendants dispute Plaintiff’s statement in that it
15 mischaracterizes the evidence. Defendants’ videos are critical parodies that target
16 the Northland Video—the object of their ridicule—because of the Northland
17 Video’s deceptive message. (DSMF at ¶¶ 13-19, 37-44, 47-48, 56). In fact, by
18 acknowledging that Defendants’ Videos are debating the message of the
19 Northland Video, Plaintiff is admitting that Defendants’ videos are in fact
20 parodies as a matter of copyright law.

21 68. Plaintiff’s Statement: Northland created the Northland Video to serve
22 multiple purposes: (i) to educate and counsel patients who are considering or who
23 have had an abortion, (ii) to educate staff about the “good woman” philosophy,
24 and (iii) to educate the public about the “good woman” philosophy and the
25 counseling services Northland provides in the communities in which it operates.

1 Defendants' Response: Defendants do not dispute that to this day, Plaintiff
2 uses the Northland Video to counsel patients and to convey its deceptive message
3 to its patients, staff, and the general public that abortion is normal, moral, and
4 “good.” (DSMF at ¶¶ 3-4, 49-50). However, Renee Chelian testified without
5 equivocation that the Northland Video had no other purpose than to de-stigmatize
6 abortion. (Chelian Dep. at 36:21-37:4 at Ex. 1). While Defendants believe the
7 Northland Video itself contradicts this testimony (*i.e.*, the Northland Video quite
8 evidently operates as an “infomercial” to promote Plaintiff), the “fact” asserted
9 here that the purpose included promoting Plaintiff’s services is contradicted by
10 Renee Chelian’s deposition testimony.

11 69. Plaintiff’s Statement: Making the Northland Video entailed spending time
12 and effort crafting a script, creating an appropriate setting, and telling a story.

13 Defendants' Response: Defendants do not dispute that Plaintiff spent time
14 creating the Northland Video. However, Defendants further assert that there was
15 nothing new or creative about the “goodness” narrative advanced by the
16 Northland Video. (R.A. Dep. at 100 at Ex. 2). Defendants further assert that the
17 Northland Video is an infomercial that simply conveys lies and distortions about
18 abortion. (DSMF at ¶ 48).

19 70. Plaintiff’s Statement: The Defendants characterize the Northland Video as
20 “promotional, advertising material.”

21 Defendants' Response: Plaintiff’s assertion is incomplete. In the evidence
22 cited by Plaintiff, TAG stated that the Northland Video is promotional,
23 advertising material posted on a business website to persuade prospective
24 customers through deceit and deception that abortion is normal and even virtuous.
25 It is intended to de-stigmatize abortion in the public mind and to gain a

1 commercial advantage vis-a-vis Northland's abortion industry competitors
2 through false advertising. The Northland Video has no market value, and it is
3 neither sold nor licensed as a product to consumers. (Wilcox Decl. at Ex. II
4 [TAG Resps. to Interrogs.]; *see also* Chelian Dep. at 38:16-17; 39:14-25; 42:3-16;
5 102:23-25; 103:1-2, 5-12; 104:20-23; 105:4-11; 106:12-18 at Ex. 1) (admitting
6 that Northland never sold or licensed the Northland Video, never had any
7 discussions about any of the essential or even non-essential terms of a sales or
8 licensing agreement, such as the price at which Plaintiff might be willing to sell
9 or license the Northland Video or the price the supposed purchasers or licensees
10 might be willing to acquire the rights to the Northland Video; and moreover,
11 Plaintiff never had any discussions regarding any of the other terms of a sale or
12 license of the Northland Video).

13 71. Plaintiff's Statement: "CBR used 2 minutes and 2 seconds of the Northland
14 Video's 4 minute and 41 seconds of footage in CBR's 4 minute and 13 second
15 video."

16 Defendants' Response: Defendants do not dispute that less than half of the
17 CBR Video is comprised of content taken from the Northland Video. This
18 percentage is the content quantum minimally required to meaningfully criticize,
19 comment upon, disparage, parody, and rebut the most deceptive elements of
20 Northland's most misleading advertising claims. (DSMF at ¶ 52).

21 72. Plaintiff's Statement:. The January 25 Video is shorter than the other CBR
22 Videos—3 minutes, 52 seconds—and uses the same Northland Video footage, so
23 53 percent of the January 25 Video is Northland's work.

24 Defendants' Response: Defendants do not dispute that approximately half
25 of the pre-production version of the CBR Video is comprised of content taken

1 from the Northland Video. This percentage is the content quantum minimally
2 required to meaningfully criticize, comment upon, disparage, parody, and rebut
3 the most deceptive elements of Northland’s most misleading advertising claims.
4 (DSMF at ¶ 52).

5 73. Plaintiff’s Statement: The TAG Video is 1 minute and 17 seconds long,
6 and the entire audio track is from the Northland Video—27 percent of the
7 Northland Video’s audio track.

8 Defendants’ Response: TAG admits that it used the content quantum
9 minimally required to meaningfully criticize, comment upon, disparage, parody,
10 and rebut the most deceptive elements of Northland’s most misleading claims,
11 and this amounted to less than one quarter of the Northland Video, which
12 comprised less than half of the TAG Video. (*See* DSMF at ¶¶ 15 [TAG Video],
13 18-19).

14 74. Plaintiff’s Statement: TAG has admitted that it “used approximately 1
15 minute of the Northland Video’s footage, which exceeds 4 minutes, in TAG’s
16 approximately 2 minute long video.”

17 Defendants’ Response: Defendant TAG admits that it used the content
18 quantum minimally required to meaningfully criticize, comment upon, disparage,
19 parody, and rebut the most deceptive elements of Northland’s most misleading
20 claims and this amounted to less than one quarter of the Northland Video, which
21 comprised less than half of the TAG Video. (Wilcox Decl. at Ex. H [TAG Am.
22 Resps. to Interrogs.]).

23 75. Plaintiff’s Statement: Ms. Chelian, the Northland Video’s creator,
24 described the video’s purpose: “Well, it’s used for counseling and it’s used in
25 training, counseling for patients, training for staff. It’s the words of women that I

1 have been seeing at Northland Family Planning since it opened and an
2 opportunity to share good messages that come from other women with other
3 women. The effort to de-stigmatize abortion is the chance to talk about our own
4 goodness and what kind of women choose abortion services, the words that
5 women tell us when they come into the clinic, the things they write in journals
6 that we have for them, to reclaim our own goodness.”

7 Defendants’ Response: Defendants admit that Plaintiff correctly quoted
8 from the Chelian deposition in which she was testifying on behalf of Northland as
9 their designated witness pursuant to Rule 30(b)(6) of the Federal Rules of Civil
10 Procedure. However, as Chelian testified, the purpose of the Northland Video
11 was to “de-stigmatize” abortion. (Chelian Dep. at 36:21-37:4 at Ex. 1).

12 76. Plaintiff’s Statement: Defendants admitted that the verbatim portions of the
13 Northland Video they chose were those that “were most pertinent to the
14 ‘goodness’ narrative.”

15 Defendants’ Response: Defendants admit that their videos are critical
16 parodies and thus conjure up those parts of the Northland Video essential for this
17 purpose since parody emerges from the joinder of reference and ridicule. (DSMF
18 at ¶¶ 18-19, 40-44, 47, 52, 56).

19 77. Plaintiff’s Statement: Defendants’ assert that their intended use of the
20 Northland Video was to criticize or comment upon “both the deceptive message
21 and the deceptive manner of Plaintiff’s staffer who narrates the Northland
22 Video.”

23 Defendants’ Response: Defendants admit that their videos are critical
24 parodies and thus conjure up those parts of the Northland Video essential for this
25

1 purpose since parody emerges from the joinder of reference and ridicule. (DSMF
2 at ¶¶ 18-19, 40-44, 47, 52, 56).

3 78. Plaintiff's Statement: Defendants contend they sought to expose the
4 “deception” of the Northland message—that good women choose abortion.

5 Defendants' Response: Defendants dispute this assertion in that it is
6 inaccurate. Defendants assert that their videos criticize, comment upon,
7 disparage, parody, mock, and disagree with both the deceptive message and the
8 deceptive manner of Northland's staffer who narrates the Northland Video.
9 Northland's consistent theme is the lie that abortion is “normal” and that it is
10 “normal” in all circumstances and at all times. Every aspect of the staffer's attire,
11 demeanor, syntax, and intonation is calculated to reinforce this deception. The
12 same is true with the flowers on her desk, the soft background music, and the
13 framed art on her walls. In fact, the Northland narrator actually uses some variant
14 of the word “good” eighteen times in four minutes to describe abortion. The CBR
15 Video comments upon, disparages, parodies, mocks, and rebuts all this duplicity
16 with an accusatory literary quote in its introduction, jarring music in its score, and
17 graphic imagery in its video refutation. (DSMF at ¶ 47). Defendants' videos are
18 intended to criticize, comment upon, disparage, parody, mock, and disagree with
19 the Northland staffer's manner as well as her message, particularly her message
20 that abortion is normal and “good” by transforming the “goodness” narrative into
21 the opposite message. (DSMF at ¶ 56).

22 79. Plaintiff's Statement: Defendants contend that “using less [of the
23 Northland Video] would have forced us [to] allow at least some of the Plaintiff's
24 outrageously false claims to go unanswered.”

1 Defendants’ Response: Defendants dispute the assertion in that the full
2 quote is as follows: “Our critical parody is available only for viewing on the
3 internet. It employs a minimalist approach to the use of Northland material but
4 using less would have forced us [to] allow at least some of the Plaintiff’s
5 outrageously false claims to go unanswered.” (Wilcox Decl. at Ex. JJ; *see also*
6 DSMF at ¶ 52).

7 80. Plaintiff’s Statement: Defendants repeatedly admit that the Northland
8 Video has a “consistent theme”—that the decision to have an abortion comes
9 “from a place of goodness.”

10 Defendants’ Response: Defendants dispute this assertion in that it is
11 incomplete. As stated in the evidence cited by Plaintiff, “Plaintiff’s consistent
12 theme is the lie that abortion is ‘normal’ and causes no harm, and further Plaintiff
13 misrepresents to young, vulnerable women that ‘when a woman decides to have
14 an abortion, she is making a choice that is thoughtful, considered, and essentially
15 coming from a place of goodness.’” (*See also* DSMF at 18, 19, 47, 56).

16 81. Plaintiff’s Statement: Northland was in discussion with at least two
17 individuals—representing multiple clinics—who expressed interest in either using
18 the Northland Video directly or creating “customized” derivative versions of the
19 Northland Video.

20 Defendants’ Response: Defendants dispute the relevance and materiality of
21 Plaintiff’s self-serving statement. The facts show that at no time in the
22 intervening two-year period from when Plaintiff produced the Northland Video
23 (2009) to when Defendants produced their critical parodies of this video (2011)
24 did Plaintiff ever sell the video or any license for the derivative use of the video.
25 In fact, Plaintiff has no draft licensing agreements, contracts, or any other such

1 documents evidencing any intent to sell or license the derivative use of the
2 Northland Video. Instead, Plaintiff submits self-serving statements that two
3 individuals had some nebulous “discussions” with Renee Chilean in which no
4 details were ever discussed, including the not-so-minor detail of the cost for any
5 such license. (*See, e.g.*, Chelian Dep. at 38:16-17; 39:14-25; 42:3-16; 102:23-25;
6 103:1-2, 5-12; 104:20-23; 105:4-11; 106:12-18 at Ex. 1) (admitting that
7 Northland never sold or licensed the Northland Video; never had any discussions
8 about any of the essential or even non-essential terms of a sales or licensing
9 agreement, such as the price at which Plaintiff might be willing to sell or license
10 the Northland Video or the price the supposed purchasers or licensees might be
11 willing to pay to acquire rights to the Northland Video; and moreover, Plaintiff
12 never had any discussions regarding any of the other terms of a sale or license of
13 the Northland Video). Most tellingly, there was not a single email, letter, note, or
14 draft of any discussion whatsoever of the use of the Northland Video by C.K. or
15 E.B., or any third-party, much less any kind of an agreement from Plaintiff to any
16 third party. (*See id.*). And this should not be surprising since Plaintiff’s “expert”
17 testified that she knew of not a single instance where a similar video was licensed
18 to another abortion provider or anyone else for that matter. (R.A. Dep. at 110:1-
19 11 at Ex. 2). Indeed, according to Plaintiff’s own documents, the only interest
20 expressed in a writing to actually use the Northland Video occurs only after the
21 CBR Video is produced and published and only after Plaintiff and its colleagues
22 became aware of the video. (Muisse Decl., Ex. A [NFP_000038] at Ex. 3). The
23 final blow to this fabrication’s legal relevance is the fact that one of Renee
24 Chelian’s own colleagues reassures her after the CBR Video is posted that there is
25 no likelihood that any reasonable person would confuse Plaintiff’s “Good

1 Woman” messaging with the CBR Video. (Muisse Decl., Ex. A [NFP_000048-B]
2 at Ex. 3). And the reason is patently obvious: Defendants’ videos turn the “Good
3 Woman” narrative on its head and are so clearly a transformative critique of the
4 reference work that they stand as the quintessential exemplar of the power of
5 parody and the propriety of fair use. (See DSMF at ¶¶ 15, 18-19, 25, 40).

6 82. Plaintiff’s Statement: Upon learning of the existence of the Infringing
7 Videos, C.K. and E.B. were no longer interested in licensing the Northland
8 Video.

9 Defendants’ Response: Defendants object to the relevance and
10 admissibility of the declarant’s self-serving opinion, which is contradicted by
11 Plaintiff’s own actions, no less. Also, it is not just that the declarant, E.B., cannot
12 per the hearsay rules speak for C.K., E.B.’s declaration does not even pretend to
13 do so. That is, E.B.’s declaration does not even mention C.K. But, to the extent
14 that E.B. might attempt to do so, this effort would fail as inadmissible hearsay.
15 See Fed. R. Evid. 801, 802. Indeed, in the testimony cited by Plaintiff, the
16 declarant, E.B., opines that “the videos made by the anti-abortion group make the
17 Northland Video useless as a counseling and educational video” and that she is
18 “concerned that using the Northland Video might increase the risk of violence at
19 my clinic because it is incendiary and demonized the people who do abortion
20 work.” However, to this day Plaintiff uses the Northland Video as a “counseling
21 and educational video,” and the video is posted on Northland’s website. (DSMF
22 at ¶¶ 3, 4, 9, 49-50). Moreover, E.B. never comes close to explaining in her
23 declaration why the Northland Video becomes “useless,” even assuming it does
24 and even assuming it becomes useless as a proximate cause of the CBR Video.
25 All of this is underscored by the fact that the Northland Video is available on the

1 Internet for anyone to view at no charge. Therefore, E.B. (or C.K. for that matter)
2 could use the Northland Video as a “counseling and educational video” at no cost.
3 Obviously, neither E.B. nor C.K. has to show the CBR Video to anyone. (*See*
4 DSMF at ¶ 5) (admitting that Plaintiff does not show any of the Defendants’
5 videos). And because they, *in their opinion*, believe the Northland Video has no
6 value as a “counseling and educational video,” yet Plaintiff still uses the video for
7 that purpose, their opinion testimony contradicts Plaintiff’s actions, which speak
8 louder than words: Plaintiff continues to post the Northland Video online for all
9 to view, and quite apparently, without any fear the CBR Video will be confused
10 with the Northland Video or create some imaginary violence against the clinic.
11 (*See* DSMF at ¶¶ 3, 4, 49, 50). As such, E.B.’s declaration is immaterial and,
12 indeed, contradicted by Plaintiff’s own actions. Plaintiff has created its own
13 factual dispute regarding the value of the Northland Video as a pro-abortion
14 “counseling and educational” tool subsequent to the posting of the CBR Video.

15 **DEFENDANTS’ CONCLUSIONS OF LAW**

16 1. “Fair use,” as codified under 17 U.S.C. § 107, is an affirmative
17 defense to copyright infringement.

18 2. In determining whether the use made of a work in a particular case is
19 a “fair use,” the court should consider the following factors:

20 a. The purpose and character of the use, including whether such
21 use is of a commercial nature or is for nonprofit educational purposes;

22 b. The nature of the copyrighted work;

23 c. The amount and substantiality of the portion used in relation
24 to the copyrighted work as a whole; and
25

1 d. The effect of the use upon the potential market for or value of
2 the copyrighted work. 17 U.S.C. § 107.

3 3. These four factors should not “be treated in isolation one from
4 another. All are to be explored, and the results weighed together, in light of the
5 purposes of copyright.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578
6 (1994).

7 4. “[T]he public benefit in allowing . . . social criticism to flourish is
8 great. The fair use exception recognizes this important limitation on the rights of
9 the owners of copyrights.” *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d
10 792, 806 (9th Cir. 2003).

11 5. Under the “purpose and character of use” factor, the reviewing court
12 considers the extent to which the new work is “transformative.” *Mattel, Inc.*, 353
13 F.3d at 800. That is, the court determines whether the new work adds “something
14 new, with a further purpose or different character, altering the first with new
15 expression, meaning, or message.” *Id.* (quoting *Campbell*, 510 U.S. at 579). The
16 court also considers whether the new work was for- or not-for-profit. *Id.*
17 Moreover, “the more transformative the new work, the less will be the
18 significance of other factors, like commercialism, that may weigh against a
19 finding of fair use.” *Campbell*, 510 U.S. at 515-16.

20 6. A parody is the use of some portion of a copyrighted work to “hold[]
21 it up to ridicule,” or otherwise comment or shed light on it. *Dr. Seuss Enters.,
22 L.P. v. Penguin Books, USA, Inc.*, 109 F.3d 1394, 1400-01 (9th Cir. 1997).

23 7. A parody is considered transformative because it provides a socially-
24 valuable criticism or commentary of the subject work. *Campbell*, 510 U.S. at
25 579. Consequently, a parody needs to use some portions of the original work

1 because the effectiveness of a parody depends upon its ability to “conjure up” the
2 original. *Id.* at 580-81, 588.

3 8. Because the author of the original is unlikely to permit the use of his
4 or her work to criticize or ridicule that work, a parody is not likely to supplant the
5 market for the original or its derivatives. *Id.* at 592.

6 9. The second factor, the “nature of the copyrighted work,” reflects a
7 recognition “that creative works are ‘closer to the core of intended copyright
8 protection’ than informational or functional works.” *Mattel, Inc.*, 353 F.3d at 803
9 (quoting *Dr. Seuss Enters., L.P.*, 109 F.3d at 1402).

10 10. The third factor “asks whether the amount and substantiality of the
11 portion used in relation to the copyrighted work as a whole, are reasonable in
12 relation to the purpose of copying.” *Mattel, Inc.*, 353 F.3d at 803 (quoting *Dr.*
13 *Seuss Enters., L.P.*, 109 F.3d at 1402).

14 11. Under the fourth factor, the relevant inquiry is whether the new work
15 tends to supplant or substitute for the potential market for the original or its
16 derivatives. *Campbell*, 510 U.S. at 592. Harm caused by effective criticism or
17 disparagement is *not* cognizable injury under the Copyright Act. *Id.* at 591-92.
18 “Because parody may quite legitimately aim at garroting the original, destroying
19 it commercially as well as artistically, the role of the courts is to distinguish
20 between biting criticism that merely suppresses demand and copyright
21 infringement, which usurps it.” *Id.* at 592 (internal citations, quotations, and
22 brackets omitted).

23 12. “[T]he only harm to derivatives that need concern” this court, “is the
24 harm of market substitution. The fact that a parody may impair the market for
25

1 derivative uses by the very effectiveness of its critical commentary is no more
2 relevant under copyright than the like threat to the original market.” *Id.* at 593.

3 Respectfully submitted,

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on May11, 2012, I electronically filed the foregoing
3 with the Clerk of the Court using the ECF system which will send notification of
4 such filing to all counsel of record. Parties not on ECF system and requiring
5 postal service: none.

6 Respectfully submitted,

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