

STATE OF NORTH DAKOTA
COUNTY OF CASS

IN DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT

Amy Jo Mattson,

Civil No. 99-3734

Plaintiff,

v.

MKB Management Corporation
d/b/a Red River Women's Clinic,

Defendant.

DEFENDANT'S PRE-TRIAL BRIEF

Defendant MKB Management Corp. (Defendant or "the Clinic") respectfully submits this pre-trial brief, which sets forth the legal standards for the issues to be presented at trial and Defendant's expectation of what the evidence presented at trial will show. This pre-trial brief also sets forth Defendant's arguments that, based on the established law and the evidence that will be presented, Plaintiff is not entitled to a permanent injunction under North Dakota Century Code § 51-12-14.

Indeed, the evidence will demonstrate that Plaintiff cannot establish a prima facie case of false advertising. Moreover, even if she could, the evidence will also demonstrate that Plaintiff is still not entitled to an injunction based on the Clinic's affirmative defenses, namely that Plaintiff's claims regarding the original brochure are moot and that equity precludes granting Plaintiff the equitable relief of an injunction. In short, the evidence will establish that the Clinic has not violated North Dakota's false advertising statute and the Plaintiff should not win this case.

I. The Legal Standards Governing False Advertising Under § 51-12-14.

In order to succeed in her claim that the Defendant is engaged in false advertising and should be permanently enjoined from using its brochure, Plaintiff bears the burdens of proof and persuasion. See, e.g., Helbling v. Helbling, 541 N.W.2d 443, 445-46 (N.D. 1995) (discussing generally complainant’s burdens of proof and persuasion); see also Fargo Women’s Health v. Larson, 381 N.W.2d 176, 179 (N.D. 1986) (discussing plaintiff’s prima facie showing under North Dakota’s false advertising statute). In order to establish a prima facie case of false advertising under North Dakota § 51-12-14, Plaintiff must prove that the Clinic has violated or proposes to violate North Dakota Code § 51-12-08. See N.D. Cent. Code § 51-12-14 (“Any person who violates or proposes to violate any of the provisions of sections 51-12-08 . . . may be enjoined by any court of competent jurisdiction.”).¹ Plaintiff must do so by a preponderance of the evidence. See, e.g., Spaeth v. Eddy Furniture Co., 386 N.W.2d 901, 903 (N.D. 1986).

The Plaintiff has challenged two of the Clinic’s brochures in this action: a brochure that the Clinic has not used since December 1999 and which the Clinic has stated it has no intention of using again; and the Clinic’s current brochure.

Accordingly, as to each brochure, the Plaintiff must prove four distinct elements to establish a prima facie case of false advertising:

- (1) the Clinic acted with intent;
- (2) the Clinic produced and disseminated a publication to the North Dakota public;

¹ It is significant to note that, even if Plaintiff were able to establish a prima facie case of false advertising, she is not automatically entitled to an injunction. North Dakota Code § 51-12-14 provides that a person who has engaged in false advertising “may be enjoined.” Id. (emphasis added). Accordingly, even if the Plaintiff could prove her claim, she would still be required to prove to the Court that an injunction should issue against the Clinic. Whether or not to issue an injunction is entirely within the Court’s discretion. As explained below, however, injunctive relief is not appropriate in this case.

- (3) the publication contained statements that were untrue or misleading; and
- (4) the Clinic knew, or with the exercise of reasonable care should have known that the statements were untrue or misleading.

As discussed below, the evidence at trial will demonstrate that the Clinic's brochures are true and not misleading. It will also show that at all times the Clinic has exercised reasonable care. Accordingly, Plaintiff cannot establish a prima facie case of false advertising and is not entitled to an injunction.

II. Plaintiff Cannot Establish a Prima Facie Case of False Advertising Because the Evidence Will Demonstrate that the Clinic's Current Brochure Statements are True and Not Misleading.

A. The Legal Standards

North Dakota courts have not elaborated on what constitutes "false" or "misleading" advertising under Sections 51-12-08 and 51-12-14. Those terms have been defined by courts in other contexts, however. For example, under the Lanham Act, a federal statute prohibiting false advertising, the Eighth Circuit has stated that, regarding the allegation that a statement is literally false or untrue, a plaintiff must demonstrate that a statement is "actually false, not simply unproven or unsubstantiated." See, e.g., United Indus. Corp. v. The Clorox Co., 140 F.3d 1175, 1181-82 (8th Cir. 1998).

Regarding statements that are alleged to be misleading, the Eighth Circuit has stated:

Where a commercial claim is not literally false but is misleading in context, proof that the advertising actually conveyed the implied message and thereby deceived a significant portion of the recipients becomes critical. If a plaintiff does not prove the claim to be literally false, he must prove that it is deceptive or misleading, which depends on the message that is conveyed to consumers.

140 F.3d at 1182-83.

Although the North Dakota Supreme Court has not elaborated on what constitutes false advertising under North Dakota's statutes, in one case it did affirm a lower court's holding that an advertisement was not misleading:

The State's argument is essentially that Eddy Furniture's going-out-of-business sale was not an "ordinary" going-out-of-business sale because additional furniture was ordered for the sale, including furniture from factories and suppliers with which Eddy Furniture had not previously done business. The State contends that the consuming public was deceived and misled into believing that Eddy Furniture was conducting a liquidation, close-out sale. In support of its argument, the State makes fine distinctions between "bargain prices," "liquidation prices," and "close-out prices." In effect, the State contends that it is per se fraudulent and deceptive to represent that a sale is a "going-out-of-business sale" when new merchandise is added to existing stock for the sale. The trial court also had to consider, however, that the State stipulated that these "added" items were sold at "bargain prices," and that Eddy Furniture's Jamestown store actually went out of business following the completion of the sale.

Spaeth, 386 N.W.2d at 904-05. In other words, because the statements were in fact true, it was not sufficient for a plaintiff to simply contend they were misleading based solely on "fine distinctions." Id.

B. The Evidence Presented at Trial Will Demonstrate that the Clinic's Current Brochure is True and Not Misleading.

The evidence at trial will show that the Clinic's current brochure includes general information about the Clinic and about abortion in general. Regarding abortion and breast cancer, the brochure states:

Some anti-abortion activists claim that having an abortion increases the risk of developing breast cancer. A substantial body of medical research indicates that there is no established link between abortion and breast cancer. In fact, the National Cancer Institute has stated "[t]here is no evidence of a direct relationship between breast cancer and either induced or spontaneous abortion."

The evidence at trial will also show that the Clinic formerly used a brochure that similarly provided general information about the Clinic and about abortion in general.

Regarding abortion and breast cancer, the former brochure stated:

Anti-abortion activists claim that having an abortion increases the risk of developing breast cancer and endangers future childbearing. **None** of these claims are supported by medical research or established medical organizations.

The evidence at trial will establish that the Clinic has not used a brochure containing this language since December 1999. The evidence at trial will also establish that the Clinic has no intention of reviving the language of its former brochure.

Plaintiff has engaged a single witness to testify in support of her claim that the statements in the Clinic's brochure are false and misleading based on her theory that induced abortion increases the risk of breast cancer. As discussed below, the evidence will demonstrate, however, that Plaintiff's sole witness is not qualified to offer this opinion—his opinions are based on fundamental misunderstandings of epidemiology, biology, reproductive endocrinology, as well as regarding the standard of care for abortion providers.² Indeed, two expert epidemiologists, Dr. Polly Newcomb and Dr. Julie Palmer, an expert reproductive endocrinologist, Dr. Gil Mor, and an expert obstetrician and gynecologist, Dr. Carol Ball, and Jane Bovard, the Clinic Administrator, will all testify at trial on behalf of the Clinic and, through their testimony, will establish that the Clinic's current brochure statements regarding abortion and breast cancer are true and not misleading. Thus, Plaintiff will fail to establish that the Clinic's brochures are false and misleading.

² Defendant's expectation regarding the evidence Plaintiff is going to present at trial is based, in part, on opinions set forth in declarations previously submitted in this action, as well as on deposition testimony.

1. “Some anti-abortion activists claim that having an abortion increases the risk of developing breast cancer.”

The evidence will demonstrate that the Plaintiff has testified that this statement is true. In addition, the evidence will show that the Plaintiff and Dr. Brind, Plaintiff’s sole witness, are both anti-abortion activists and each contends that having an abortion increases the risk of developing breast cancer.

The evidence will also demonstrate that this statement is not misleading. It is clearly not misleading to state that some anti-abortion activists adhere to this belief. The statement could not fairly said to mislead the public into believing that only anti-abortion activists claim that having an abortion increases the risk of breast cancer, as it does not even represent that all anti-abortion activists make that claim.

2. “A substantial body of medical research indicates that there is no established link between abortion and breast cancer.”

The evidence will also demonstrate that Plaintiff has testified that this statement is true. In addition, two of the Clinic’s expert witnesses, Dr. Newcomb and Dr. Palmer, will testify that there is, in fact, an overwhelming and substantial body of medical research that indicates there is no established link between abortion and breast cancer. These epidemiologists will testify that the best studies demonstrate there is no link and that the Clinic’s statement is true.

The evidence will also demonstrate that the Clinic’s statement is not misleading. The expert epidemiologists will testify that this statement will correctly lead people to believe that there is no established connection between abortion and breast cancer.

3. “In fact, the National Cancer Institute has stated ‘[t]here is no evidence of a direct relationship between breast cancer and either induced or spontaneous abortion.’”

The evidence will also demonstrate that Plaintiff has testified that this statement is also true and, indeed, the statement speaks for itself. The Clinic’s epidemiologists and reproductive endocrinologist will testify not only that the National Cancer Institute has made this statement, but also that, in fact, there is no evidence of a direct relationship between breast cancer and abortion. They will explain that in order for a relationship to be considered direct, there must be a straightforward cause and effect. They will further testify that there is no such cause and effect connection between the two.

The evidence will also demonstrate that this is not a misleading statement. Plaintiff has argued previously in this litigation that because the National Cancer Institute has made more recent statements, that this renders the Clinic’s quotation misleading. The evidence will establish, however, that the statement is not misleading because it correctly leads people to believe that abortion is not a direct cause of breast cancer and that there is no evidence that it is. The evidence will demonstrate, in fact, that the Clinic’s experts do not even believe the NCI’s more recent statement to be significantly different than the statement used in the Clinic’s brochure.

C. The Evidence Will Demonstrate that Plaintiff’s Sole Witness is Not Credible, His Opinions Are Biased and His Opinions are Entitled to Little Weight, If Any.

Plaintiff’s sole witness at trial is Joel Brind, Ph.D. Dr. Brind is expected to testify that, based on his understanding of epidemiology, having an induced abortion causes an increased risk of breast cancer. Dr. Brind is expected to testify to three main points in support of his opinion: (a) based on his own “meta-analysis” study, there is an increased

risk of breast cancer from induced abortion; (b) many studies show a statistically significant increased risk; and (c) there is a plausible biological explanation for why induced abortion increases risk of breast cancer. The evidence will show that all of Dr. Brind's ideas are misguided, incorrect, and biased.

1. Dr. Brind's Opinions Are Misguided and Incorrect.

The evidence at trial will show that:

a. Dr. Brind's meta-analysis is unsound and therefore it is not reliable.

- *Dr. Brind is not an epidemiologist.*

The Clinic's two expert epidemiologists will testify that Dr. Brind's understanding of epidemiology in the area of induced abortion and breast cancer is uninformed and wrong. They will testify that the subject of induced abortion and breast cancer has been studied thoroughly and that there is no cause and effect connection between the two.

The evidence will also show that epidemiologists regard a 1.3 relative risk as an extremely small risk in epidemiological terms and susceptible to bias. Established associations are typically much greater.

The evidence will also show that Dr. Brind does not understand epidemiological literature because he incorrectly mischaracterizes studies and their results.

- *Dr. Brind's meta-analysis is seriously flawed.*

The epidemiologists will explain that a meta-analysis is a type of study that attempts to discern epidemiological trends by synthesizing the literature in a given area and that a meta-analysis is only as good as the studies it synthesizes. The epidemiologists will testify that Dr. Brind's meta-analysis is inconsistent with epidemiological standards because, for example, it includes incomplete studies, and also it extrapolates data from other sources and then interposes it into the studies included in his meta-analysis.

- *Meta-analysis in general, even well-conducted, is not a good tool to measure associations in this area.*

The epidemiologists will testify that, in fact, a meta-analysis of induced abortion and breast cancer is not even a good way to analyze this subject area because it simply reproduces the problems, such as recall bias, that are inherent in the retrospective studies it synthesizes.

b. **“Statistical Significance” Does Not Mean Cause and Effect and it is Misleading to Use the Term to Imply that it Does.**

- *It is incorrect to talk about “statistical significance” as if it has to do with whether a study is valid.*

The epidemiologists will also testify that statistical significance has to do with the likelihood that a finding is due to chance. It has nothing to do with validity or causality. For example, it might be shown that most car accidents occur at night; this does not mean, however, that darkness causes car accidents. The evidence will show that a finding can be *statistically significant* if there is more than a 95% probability that the finding is not due to chance, but that one cannot infer causation based solely upon statistically significant results.

The evidence will also demonstrate that Dr. Brind’s conclusions as to statistical significance demonstrate his lack of understanding of basic epidemiological concepts. Accordingly, when Dr. Brind states that 17 out of 33 studies in this area reported a statistically significant increase, that does not mean that 17 out of 33 studies show a valid association between induced abortion and breast cancer.

- *It is incorrect to use the term “statistical significance” to imply that an increased risk of breast cancer results from induced abortion.*

The expert epidemiologists will also testify that to talk about statistical significance as if it has to do with validity or cause and effect is misguided and misleading.

c. **Dr. Brind's Theory About a Biological Link Between Abortion and Breast Cancer is Incorrect and Unfounded.**

- *There is no evidence to establish a biological mechanism linking abortion and breast cancer.*

The Clinic's experts' testimony will demonstrate that Dr. Brind's testimony regarding a plausible biological mechanism that might explain a connection between induced abortion and breast cancer is simply wrong.

- *Women who have induced abortions are in exactly the same position as women who has never been pregnant regarding their long-term relationship to breast cancer.*

The Clinic's experts will all testify that the loss of a possible long-term *benefit* (from a full-term pregnancy) is not the same thing as the cause of a long-term *harm*. The evidence will demonstrate that there is no biological support for the proposition that a woman who has an induced abortion is worse off relative to breast cancer than if she had never been pregnant. The evidence will show that having an abortion maintains a woman's status quo relationship to breast cancer, it does not increase her risk of harm.

- *Estrogen levels for spontaneous abortion and induced abortions are the same.*

The evidence will demonstrate that estrogen is not a carcinogen that causes breast cancer with exposure or overexposure. The evidence will also demonstrate that the vast majority of spontaneous abortions are attributable to fetal defects and deficiencies in the female immune system, and not to low estrogen levels. Dr. Brind's understanding of estrogen and his premise regarding differences between breast cancer rates for spontaneous and induced abortion are simply incorrect.

- *There is no evidence of a direct relationship between abortion and breast cancer.*

The Clinic's experts will testify that there is no evidence to support a direct connection between induced abortion and breast cancer, and no credible theory that would distinguish why induced abortion would increase the risk of breast cancer, but spontaneous abortion would not.

2. **Dr. Brind is Biased By His Anti-Abortion Agenda.**

The evidence at trial will demonstrate that Dr. Brind’s pro-life bias directs his focus and opinions solely on abortion. The evidence will show that Dr. Brind does not advocate that his theories be applied to any area other than abortion, and that his research has been funded in part by anti-abortion groups.

III. The Evidence Will Demonstrate that the Clinic at all times has Exercised Reasonable Care to Ensure its Brochures are True and Not Misleading.

A. The Legal Standards for Determining Reasonable Care.

In order to establish that the Clinic engaged in false advertising, Plaintiff is required to demonstrate either:

- 1) that the Clinic knew its statements were untrue or misleading, or
- 2) by the exercise of reasonable care, the Clinic should have known that the statements were untrue or misleading.

See 51-12-08 (false advertising statutory section relied upon by Plaintiff as basis for injunction under North Dakota Century Code Section 51-12-14) (emphasis added).³

In North Dakota, the standard of care is that a “medical specialist must exercise the care and skill ordinarily possessed and exercised by, and reasonably expected of, other specialists engaged in similar practice.” See, e.g., Benedict v. St. Luke’s Hosp., 365 N.W.2d 499, 502 (N.D. 1985); Winkjer v. Herr, 277 N.W.2d 579, 583-84 (N.D. 1979) (“A physician is required to exercise such reasonable care and skill as are exercised ordinarily by physicians practicing in similar localities in the same general line of practice.”).

³ Previously in this litigation, Plaintiff has attempted to invoke “common sense” and North Dakota Century Code Section 51-12-01 to impose strict liability upon the Clinic. See Pl. Mem. Cross-S.J. at 9. The applicable statutory language, however, does not impose that standard. See N.D. Cent. Code §§ 51-12-08, 51-12-14. Indeed, an injunction for false advertising under Section 51-12-14 is not available for violation of Section 51-12-01. See N.D. Cent. Code § 51-12-14 (applies only to provisions of sections 51-12-08 through 51-12-12).

B. The Evidence Will Demonstrate that the Clinic At All Times Exercised Reasonable Care.

The evidence will demonstrate that at no point has the Clinic known that its statements regarding abortion and breast cancer were either false or misleading. Accordingly, Plaintiff cannot establish this element of a prima facie case of false advertising under Sections 51-12-08 and 51-12-14.

The evidence will also demonstrate that the Clinic exercised and continues to exercise reasonable care as to the statements in both its original brochure and its current brochure.

1. The evidence will demonstrate the Clinic exercised reasonable care in its original brochure by relying on the National Abortion Federation.

The evidence will demonstrate that the original brochure language challenged by the Plaintiff was copied by the Clinic directly from a National Abortion Federation (NAF) Fact Sheet.⁴ NAF is an organization whose members must meet the highest standards for provision of abortion care in order to be eligible for membership. The evidence will also demonstrate that the Clinic is a NAF member and has been since it opened in 1998.

The evidence will also demonstrate that NAF sets a very high standard of care for abortion providers. The evidence will demonstrate that the NAF information was entirely consistent with the information the Clinic's Administrator and physician knew and reasonably believed to be correct on the subject of the non-existence of a link between abortion and breast cancer. Accordingly, given that NAF is regarded by abortion

⁴ As discussed, *infra*, Plaintiff's claim regarding the Clinic's original brochure is moot and, therefore, is not properly considered on its merits.

practitioners to set the highest standards for abortion-related services, see also Greenville Women's Clinic v. Bryant, 222 F.3d 157, 167-69 (4th Cir. 2000) (stating that it is reasonable for States to rely on NAF standards since NAF is recognized as setting appropriate standard of care), cert. denied, xxxxxx, the evidence will prove that the Clinic exercised more than reasonable care when it relied on the NAF information for its original brochure. Accordingly, Plaintiff will not be able to establish a prima facie case of false advertising under Sections 51-12-08 and 51-12-14.

2. The evidence will demonstrate that the Clinic exercised, and continues to exercise, reasonable care to ensure its current brochure is true and not misleading.

The evidence at trial will also show that the Clinic endeavored to choose language that could not be construed as misleading on the issue of an alleged abortion and breast cancer connection. The evidence will also demonstrate that the Clinic searched to find the most up-to-date and trustworthy statements regarding abortion and breast cancer. The evidence will establish that the statements contained in the Clinic's current brochure are derived from statements the Clinic knows to be correct and representative of the positions of prestigious and credible organizations including not only the National Cancer Institute, but also the American Cancer Society, the National Breast Cancer Coalition, the World Health Organization, and the American College of Obstetricians & Gynecologists Committee on Gynecologic Practice. The evidence will also establish that the Clinic is aware that these organizations are the leading national and international agencies on both the subjects of cancer and abortion practice. See also Greenville Women's Clinic, 222 F.3d at 167-69 (stating that American College of Obstetricians & Gynecologists also sets standard of care for abortion providers reasonably relied upon by States). The evidence

will show that the Clinic reasonably relied and continues to rely on these organizations in assessing the accuracy of the information contained in its brochure.

Furthermore, the evidence at trial will prove that, although the National Cancer Institute no longer uses the exact statement quoted in the Clinic's brochure, the Clinic's experts each believe that the quoted National Cancer Institute's statement is both accurate and not misleading as a matter of scientific opinion. Thus, the evidence will demonstrate that it is reasonable for the Clinic to rely on the recommendations of its experts, such as Dr. Newcomb, Dr. Palmer, Dr. Mor, and Dr. Ball, in addition to its primary clinical physician.

IV. The Evidence Will Demonstrate that Plaintiff's Claims Regarding the Clinic's First Brochure Are Moot.

A. Legal Standards

In North Dakota, a case is moot if there no longer exists a live legal controversy to be determined by the Court. See, e.g., Sposato v. Sposato, 570 N.W.2d 212, 213 (N.D. 1997); Gosbee v. Bendish, 512 N.W.2d 450, 452-53 (N.D. 1994). It is clearly established under North Dakota law that a Court may consider a moot issue only when a case involves public officials and is a situation that is capable of repetition, yet evades review. See, e.g., Sposato, 570 N.W.2d at 213-14; Gosbee, 512 N.W.2d at 452-53.

In North Dakota, a case is capable of repetition but evading review if it involves an inherently time-sensitive situation. See, e.g., Nord v. Herrman, 577 N.W.2d 782 (N.D. 1998) (boundary dispute issue was not moot where lake had history of rising and falling); Bolinske v. North Dakota State Fair Assoc., 522 N.W.2d 426, 430 (N.D. 1994) (issue was not moot where state fair was an annual event of short duration that prevented timely review); see also In the Interest of E.T., 617 N.W.2d 470, 471 (N.D. 2000) (issue was

moot where involuntarily committed patient who was forced to use feeding tube was released and no longer on tube; “[i]f the trial court subjects [plaintiff] to involuntary medication in the future, she will not be prevented from appealing such an order.”).

B. The Evidence

The evidence will demonstrate that the Clinic is no longer using the language in the brochure originally challenged by Plaintiff. The evidence will also establish that this case does not involve public officials. The evidence at trial will also show that Defendant has absolutely no intention of reverting to the former language. Moreover, if it did revert to the earlier language, it would then be subject to new judicial challenge. Accordingly, the evidence will demonstrate that Plaintiff’s claim regarding the Clinic’s original brochure is moot and should not be considered.

V. The Evidence Will Demonstrate that Equitable Defenses Bar Plaintiff from Obtaining the Equitable Remedy of an Injunction.

In this action, Plaintiff seeks only equitable relief in the form of an injunction. Established equitable principles and the evidence presented at trial will demonstrate that—even apart from the lack of merits of her claims—Plaintiff is not entitled to the relief she seeks. At trial, the evidence will show that Plaintiff comes to this Court with “unclean hands.” For these reasons she should not be permitted to succeed on her request for an injunction.

A. Legal Standards

It is well established that one who seeks equity must come with clean hands. See, e.g., Borth v. Gulf Oil Exploration & Prod. Co., 313 N.W.2d 706 (N.D. 1981); Cross v. Farmers’ Elevator Co. of Dawson, 153 N.W. 279 (N.D. 1915); see also Frieh v. City of

Edgeley, 317 N.W.2d 818, 820 (N.D. 1982) (unclean hands doctrine protects the integrity of the court and thus it may be addressed sua sponte). The equitable doctrine of unclean hands is appropriately applied to a request for an injunction under North Dakota’s False Advertising Statute. See, e.g., Newman v. Checkrite California, Inc., 912 F. Supp. 1354, 1375-76 (E.D. Cal. 1995) (recognizing that equitable defenses are appropriately raised against claims under California Business and Professions Code, including Unfair Competition Statute prohibiting false and misleading advertising); see also Glatt v. Bank of Kirkwood Plaza, 383 N.W.2d 473, 476 n.3 (N.D. 1986) (stating that because North Dakota and California’s statutory code sections share a common origin, cases interpreting California law “while not binding, are entitled to respectful consideration, and may be persuasive and should not be ignored.”) (internal quotations omitted)). The doctrine of unclean hands applies when one party’s behavior harms another. See, e.g., Jacobsen v. Pederson, 190 N.W.2d 1, 4 (N.D. 1971) (unclean hands apply when one party’s behavior harms another).

Traditional equitable principles preclude Plaintiff’s request for equity. See also Minneapolis, St. Paul & Sult Ste. Marie Railroad Co. v. Duvall, 67 N.W.2d 593, 598-99 (N.D. 1954) (equitable estoppel applies to preclude request for equity when, inter alia, there is an “admission, statement, concealment or act by the plaintiff inconsistent with the claim now asserted”).

B. The Evidence Will Demonstrate that Plaintiff’s Request for Equitable Relief is Barred by Equity.

The evidence will demonstrate that at the time she filed her lawsuit and for the eight months she resided in Fargo, Plaintiff distributed false and misleading literature to women seeking abortion in an effort to dissuade them from getting abortions. The

evidence will demonstrate that the Plaintiff handed out more than 500 brochures that contained numerous misleading and outright false statements regarding risks associated with abortion, not the least of which is a statement that “[a]bortion is physically dangerous and hurts women” and that 31% of women who had first-trimester abortions attempted suicide.

The evidence will also show that although Plaintiff “counseled” women outside of the Clinic for eight months prior to moving out of Fargo in April, 2000, Plaintiff herself only advised women of the alleged risk of breast cancer during the month of April—notwithstanding that she was suing the Clinic to require it to make affirmative disclosures regarding the so-called link starting in December, 1999. The evidence will demonstrate that Plaintiff undermined her own allegations in this lawsuit and simultaneously engaged in behavior seriously harmful to the Clinic and women seeking abortions in North Dakota.

The evidence will also demonstrate that the Plaintiff has consistently represented herself to women seeking abortions as a counselor and that at no time was she ever licensed as a counselor in North Dakota.⁵

In fact, the evidence will indicate that the purpose of bringing this lawsuit is to use North Dakota’s false advertising statute to harass the Clinic and to chill the Clinic’s business of providing abortions to women.⁶

⁵ Under North Dakota law, “no person may engage in counseling in this state unless that person is a licensed professional counselor or licensed associate professional counselor”. See N.D. Cent. Code § 43-47-06.

⁶ Abortion providers may represent their own interests and the interests of their patients. See, e.g., Singleton v. Wulff, 428 U.S. 106, 108 (1976) (abortion providers traditionally accorded third-party standing on behalf of women seeking abortions). Accordingly, the Clinic has standing to assert the harm not only to itself, but also to its patients.

The evidence will demonstrate that this litigation is improperly designed to stop abortions and to serve as a political vehicle—not for the genuine consumer interests of North Dakota women. Plaintiff acknowledges that she has in no way been personally harmed by the Clinic—nor could she, given that she had never even seen the brochure her lawsuit purports to attack. Plaintiff also acknowledges that she is opposed to abortion and believes that abortion should be stopped.

Accordingly, the evidence at trial will demonstrate that Plaintiff’s hands are unclean by virtue of her own behavior during this litigation and that this lawsuit is designed as part of a campaign to scare women away from abortion.

VI. The Evidence Will Demonstrate that Plaintiff’s Requested Affirmative Injunction is Against the Standard of Care and Will Compel the Clinic to Make Statements Which are False and Misleading.

A. Legal Standards

Mandatory injunctions are rarely issued and interlocutory mandatory injunctions are even more rarely issued, and neither except upon the clearest equitable grounds. See, e.g., O’Malley v. Chrysler Corp., 160 F.2d 35, 36 (7th Cir. 1947) (citing 43 C.J.S. INJUNCTIONS, § 5, pp. 410, 411, 412; 28 AM.JUR., INJUNCTIONS, 20; HIGH ON INJUNCTIONS (3rd ed.), Sec. 2); see also Fargo Women’s Health, 381 N.W.2d at 179 (reversing district court in false advertising case solely on basis that court ordered anti-abortion “fake” clinic to inform patients that it did not perform abortions on ground that order was “unduly broad restriction, the imposition of which constituted an abuse of discretion by the trial court.”).

The only federal court to address the substance of claims that induce abortion causes breast cancer concluded that it was reasonable for a municipal railway to find that

an advertisement stating that “women who choose abortion suffer more and deadlier breast cancer” was “misleading” and “unduly alarming.” See Christ’s Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority, 937 F. Supp. 425, 434 (E.D. Pa. 1996), rev’d on other grounds, 148 F.3d 242 (3d Cir. 1998).

North Dakota regulates informed consent for abortion by statute. See N.D. Cent. Code § 14-02.1-02 et seq.

“[A] physician is not required to disclose all possible risks and dangers of [a] proposed procedure but only those that are significant in terms of their seriousness and likelihood of occurrence. There is no need to disclose risks of little consequence, those that are extremely remote, or those that are common knowledge as inherent in the treatment.” Winkjer, 277 N.W.2d at 588.

B. The Evidence

The evidence will demonstrate that the Plaintiff’s originally requested “warning” to women seeking abortions is untrue and seriously misleading.

The evidence will also demonstrate that the Plaintiff’s requested warning, that the Clinic be required to advise women seeking abortions about a possible long-term protective effect of full term pregnancy against breast cancer is also misleading, contrary to the statements in the Clinic’s brochure that it seeks to purge, because it implies that women who have abortions increase their risk relative to their long-term likelihood of getting breast cancer, when in fact they will be in exactly the same position as if they had never been pregnant. It also misleads women by providing them information solely as relates to only one possible long-term benefit, while ignoring altogether that the possible long-term protective effect may be offset, or abrogated altogether by many variables,

including the established increased risk of breast cancer that follows all full-term pregnancies, the health effects of stress and carrying an unwanted pregnancy to term, and other possible health effects associated with young pregnancy. The evidence will also demonstrate that the proposed warning is also misleading because it focuses solely on first full-term pregnancies and ignores that many women who obtain abortions in North Dakota have already had at least one child and, therefore, they will already have gained any possible long-term protective effect.

CONCLUSION

In sum, the legal standards that govern the issues to be presented at trial and the evidence will demonstrate that Plaintiff may not succeed on her request for an injunction in this case. Plaintiff cannot establish a prima facie case of false advertising: she has acknowledged the Clinic's current brochure is true, the Clinic's brochure is in fact true and not misleading, and at all times the Clinic has exercised reasonable care to ensure that its brochures are true and not misleading. Moreover, Plaintiff's claim as to the Clinic's original brochure are moot. Equity bars Plaintiff from obtaining an equitable remedy with which she herself did not comply during the significant pendency of this litigation and because she has unclean hands. Finally, for all of these reasons also, Plaintiff cannot succeed on her request for an affirmative injunction, the contents of

which will mislead women away from patronizing a legitimate North Dakota business
and, more significantly, from exercising their constitutionally protected right to privacy.

Respectfully submitted,

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