

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.

**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT, ATTORNEYS' FEES AND EXPENSES**

The undisputed facts establish that this lawsuit is an example of the worst kind of sham litigation. At the time the original complaint was filed in this action, Plaintiff had not seen the brochure that she alleged was false and misleading. At the time of her deposition on March 1, 2001, Plaintiff had still never seen the Clinic's revised brochure about which she demanded an expedited motion for temporary injunction hearing. Plaintiff acknowledges that her amended complaint contains false statements, notably regarding her two alleged connections to the claims in this lawsuit.

As set forth below, this Court should grant summary judgment to the Clinic on all of Plaintiff's claims for injunctive relief. Plaintiff plainly lacks standing to pursue her claims and should be precluded from injunctive relief based on her own inequitable behavior. In addition, Defendant at all times exercised reasonable care to ensure that its brochures were not false or misleading. Plaintiff's claim regarding the Clinic's original brochure is moot, and Plaintiff has conceded that the Clinic's brochure is not false. Finally, because Plaintiff's supplemental complaint was false and not made in good faith,

this Court should award the Clinic its reasonable attorneys' fees and expenses related to all proceedings that post-date Plaintiff's supplemental complaint.

### **I. STATEMENT OF UNDISPUTED FACTS**

On or about December, 15, 1999, Plaintiff Amy Jo Mattson (Plaintiff) filed a complaint against Defendant MKB Management Corporation, d/b/a Red River Women's Clinic (Defendant or the Clinic), seeking an injunction based on North Dakota's false advertising statute. At the time that she filed that complaint, Plaintiff had never seen the Clinic's brochure upon which she based her lawsuit. See Deposition of Amy Jo Mattson (Mattson Dep.) 50-51.

On or about July 17, 2000, Plaintiff filed a supplemental complaint and requested a temporary injunction based on the Clinic's revised brochure. At the time the supplemental complaint was filed, Plaintiff had never seen the Clinic's revised brochure. See Mattson Dep. 53-54. At the time of Plaintiff's deposition, she had still never seen the Clinic's revised brochure. Id. In her deposition, Plaintiff acknowledged that her supplemental complaint contained false statements. See Mattson Dep. 82-83. Plaintiff's Supplemental Complaint falsely represented her place of residence (at the time the Supplemental Complaint was filed, Plaintiff no longer lived in Fargo) and her occupation (at the time of the Supplemental Complaint, Plaintiff was no longer a sidewalk counselor). Id.

Plaintiff was a self-identified "sidewalk counselor" for eight months during the pendency of this litigation and, as such, she attempted to dissuade women seeking abortions from doing so. See Mattson Dep. 12. As a sidewalk counselor, Plaintiff handed out more than 500 brochures that purported to describe the risks associated with

abortion. During seven of those eight months, however, she did not advise women that abortion causes breast cancer. See Mattson Dep. 15-16. The brochure that Plaintiff distributed was entitled, “What They Won’t Tell You Inside” and states, among other things, that “[a]bortion is physically dangerous and hurts women.” See Mattson Dep. 3 (listing brochure as Mattson Exhibit 1); see also Bovard Aff. Exh. A. Plaintiff advised women that abortion causes breast cancer for only *one month* of the eight months of sidewalk counseling she engaged in Fargo after the filing of this lawsuit. See Mattson Dep. 16.

The Clinic endeavors to provide the highest level of care to its patients. See Bovard Aff. ¶ 12. The Clinic relied on a fact sheet from the National Abortion Federation (NAF) when it crafted its language regarding breast cancer and abortion in its original brochure. Bovard Aff. ¶ 2. NAF is an elite organization of abortion providers that sets the highest standard of care for its members. See Bovard Aff. ¶ 4. The Clinic has been a NAF member since 1998. See Bovard Aff. ¶ 3. When the Clinic revised its brochure, it worked with its attorneys to ensure that the language would be true and not misleading on the issue of induced abortion and breast cancer. Bovard Aff. ¶ 7. The Clinic relied on the most current statement by the National Cancer Institute that it had at the time. Bovard Aff. ¶ 8. The National Cancer Institute is an organization renowned for its expertise on cancer. See Bovard Aff. ¶ 9. The Clinic’s expert epidemiologists and physician have advised the Clinic that the statements in its current brochure are true and not misleading and consistent with the standard of care for abortion providers. See Bovard Aff. ¶ 10.

The Clinic, its reputation, and its patients have been harmed as a result of the allegations in this lawsuit. Bovard Aff. ¶¶ 11-13, 17-18.

## II. ARGUMENT

### A. Summary Judgment Standard.

Summary judgment is a procedural device for the expeditious disposition of a controversy without a trial if either party is entitled to judgment as a matter of law, if no dispute exists as to either the material facts or the inferences to be drawn from undisputed facts, or if resolving disputed facts would not alter the result. See Mandan Educ. Ass'n v. Mandan Public School Dist. No. 1, 610 N.W.2d 64, 66-67 (N.D. 2000) (citing Smith v. Land O'Lakes, Inc., 587 N.W.2d 173 (N.D. 1998)). Evidence must be viewed in the light most favorable to the party opposing the motion, who must be given the benefit of all favorable inferences which can reasonably be drawn from the evidence. Mandan, 610 N.W.2d at 66-67 (citing Stanley v. Turtle Mountain Gas & Oil, Inc., 567 N.W.2d 345 (N.D. 1997)). An issue of fact may become an issue of law if reasonable persons could reach only one conclusion from the facts. See Mandan, 610 N.W.2d at 66-67 (citing Hurt v. Freeland, 589 N.W.2d 551 (N.D. 1999); Kuntz v. Muehler, 603 N.W.2d 43 (N.D. 1999)).

### B. Plaintiff Does Not Have Standing.

A party is entitled to have a court decide the merits of a dispute “only after demonstrating the party has standing to litigate the issues placed before the court.” Rebel v. Nodak Mutual Ins. Co., 585 N.W.2d 811, 813 (N.D. 1998). ““Standing is a concept utilized to determine if a party is sufficiently affected so as to insure that a justiciable

controversy is presented to the court.’’ Billey v. North Dakota Stockmen’s Assoc., 579 N.W.2d 171, 173 (N.D. 1998) (quoting Black’s Law Dictionary 1405 (6th ed. 1990)).

The North Dakota Supreme Court has explained that:

The question of standing focuses upon whether the litigant is entitled to have the court decide the merits of the dispute. It is founded in concern about the proper and properly limited role of the courts in a democratic society. Without the limitation of the standing requirements, the courts would be called upon to decide purely abstract questions. As an aspect of justiciability, the standing requirement focuses upon whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to justify exercise of the court’s remedial powers on his behalf.

State v. Carpenter, 301 N.W.2d 106, 107 (N.D. 1980) (internal citations omitted). Thus, separate and apart from whether the North Dakota legislature has created a statutory cause of action to vindicate false advertising claims via North Dakota Century Code Section 51-12-14, is the question of what are the prudential requirements for a plaintiff to proceed in North Dakota courts.

Section 51-12-14 provides that “[a]ctions for injunction under this section may be prosecuted . . . by any person acting for the interests of itself, its members, or the general public.” N.D.C.C. § 51-12-14. Although the North Dakota legislature may have intended to provide broad standing to vindicate claims of false advertising under this section, it cannot go beyond the prudential restrictions placed on North Dakota courts. See, e.g., City of Carrington v. Foster County, 166 N.W.2d 377 (N.D. 1969) (stressing separation of powers and finding that legislature could not expand, beyond judiciary’s institutional role, scope of judges’ duties to include rendering of ex parte opinions).

North Dakota courts do not extend standing to any random person who wants to bring a lawsuit, even in the face of broad statutory language. Significantly, the North Dakota Supreme Court has previously rejected providing limitless standing,

notwithstanding statutory language nearly *identical* to the language in the false advertising statute. See State v. Rosenquist, 51 N.W.2d 767 (N.D. 1952). In Rosenquist, the North Dakota Supreme Court considered a statute that provided that “any person” could bring an action to determine adverse claims and to quiet title. Id. at 770. The Court held that, notwithstanding the statutory language, prudential limitations on standing applied. Id. at 778-89. The Court relied upon a Minnesota Supreme Court case in which that court addressed and rejected a similarly broad standing provision. Quoting from the Minnesota Supreme Court, the North Dakota Court explained:

The contention of plaintiff, plainly stated, is that under the literal wording of this statute, any person who says that he claims title, without either alleging or proving that he has in fact any title to, or interest in, the real estate, may maintain an action against any other person who claims an interest in it, and compel him to prove his title, or be adjudged to have none. If the statute means this, it certainly establishes a most unreasonable and anomalous rule. We think it was never before heard of, in judicial proceedings, that one person, who has no interest whatever in property, may maintain an action against another who claims some interest in it, and compel him to prove the validity of his claim. We do not think the statute was intended to establish any such rule.

Rosenquist, 51 N.W.2d at 789 (quoting Herrick v. Churchill, 29 N.W. 129 (Minn. 1886)); see also Rosenquist, 51 N.W.2d at 710-11 (“[w]hat was said by the Supreme Court of Minnesota in Herrick v. Churchill . . . is quite applicable here.”). The Court concluded that, notwithstanding the seemingly boundless standing accorded by the statute in that case, the plaintiff could not maintain its cause of action. See Rosenquist, 51 N.W.2d at 711.

The Court’s rejection of limitless standing is consistent with the fundamental institutional separation of powers upon which North Dakota’s tripartite government is founded. See, e.g., City of Carrington v. Foster County, 166 N.W.2d 377 (N.D. 1969)

(discussing separation of powers and institutional roles of legislature and judicial branches of North Dakota government); Langer v. State, 284 N.W. 238 (N.D. 1939) (stating that North Dakota’s Declaratory Judgment Act does not authorize advisory opinions and stating that, “In this state the Legislature is without power to charge the courts with the performance of non-judicial duties.”) (quoting Self-Insurers’ Assoc. v. State Indus. Comm’n, 119 N.E. 1027 (N.Y. 1918)). If a person believes strongly in a political cause, they can champion that cause to the legislature. If that person has been harmed in some way, or has a live controversy, that person may bring her case to a court. Without some connection to the claims alleged in a lawsuit, however, the fundamental roles of the two institutions—legislature and court—are impermissibly blurred. See, e.g., Shaw v. Burleigh County, 286 N.W.2d 792 (N.D. 1979) (discussing implications of division of governmental powers among three branches of government and stating that “it is a fundamental principle that the Legislature cannot . . . impose upon the judiciary non-judicial duties.”); N.D. Atty. Gen’l Op. No. 92-20, 1992 WL 674292 (Dec. 29, 1992) (discussing different and inviolable roles of three branches of North Dakota government and stating, “the Judicial Branch interprets and applies the laws when controversies arise. Each branch must exercise its power within its own sphere of authority. This distribution of powers is called the ‘Separation of Powers Doctrine.’”) (internal quotations omitted); see also Stop Youth Addiction v. Lucky Stores, Inc., 950 P.2d 1086, 1109 (Cal. 1998) (Brown, J. dissenting) (stating that conferring on every resident of California standing under California’s false advertising counterpart “raises substantial separation of powers issues”). Consistent with the separation of powers doctrine, prudential considerations prohibit North Dakota courts from rendering “advisory opinions” or opinions on matters

that do not involve a live controversy between the parties. See, e.g., Richland County Watere Res. Bd. v. Pribbernow, 442 N.W.2d 916, 918 (N.D. 1989) (stating that the district court’s opinion was an impermissible advisory opinion “unnecessary to the determination of any controversy between the parties.”).

The Plaintiff in this case is without any connection to the claims she purports to advance in this litigation. Plaintiff acknowledges that she has not been personally harmed by the Clinic’s brochures. See Mattson Dep. 55. As stated above, at the time that Plaintiff filed her complaint in this action, she had not even seen the Clinic’s brochure she alleged was false and misleading. See Mattson Dep. 51 (stating that it was “[p]robably a few months” after the complaint was filed that she first saw Defendant’s brochure). At the time of her deposition, on March 1, 2001, Plaintiff had still never seen the Clinic’s revised brochure—notwithstanding that she had filed a supplemental complaint based on that brochure and demanded a motion for temporary injunction hearing. See Mattson Dep. 53 (stating that Plaintiff has never seen Defendant’s redacted brochure); see also Mattson Dep. 60 (same).<sup>1</sup>

This Court has a continuing duty to ensure that Plaintiff has standing to pursue her claims. See, e.g., Langer, 284 N.W. at 245 (examining standing issue sua sponte, notwithstanding that parties had not raised issue); see also Union State Bank v. Miller, 358 N.W.2d 222 (N.D. 1984) (stating that court has a duty to ensure that court has proper jurisdiction); Baker v. Lenhart, 195 N.W. 16 (N.D. 1923) (“Jurisdiction relates to the

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<sup>1</sup> As discussed infra, because Plaintiff had no empirical basis for her supplemental complaint or the temporary injunction hearing she demanded (and refused to continue, notwithstanding an offer by Plaintiff to remove the challenged language pending a trial on the merits, thus giving Plaintiff substantially all of the relief she was requesting), Defendant is seeking that its attorneys’ fees and expenses related to that expedited hearing be reimbursed pursuant to North Dakota Century Code Section 28-26-31 (“Pleadings not made in good faith.”) or North Dakota Century Code Section 28-26-01 (frivolous pleadings).

power of the tribunal, and not to the rights of the parties.”) (quoting Dahlgren v. Superior Court, 97 P. 681 (1908)); National Org. for Women v. Scheidler, 510 U.S. 249, 255 (1994) (“Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation.”). It is clear in this case that Plaintiff does not have sufficient standing to satisfy the prudential requirements that inhere in this Court’s function as a judicial tribunal.<sup>2</sup> Accordingly, the Court should grant Defendant summary judgment on the basis that Plaintiff does not have standing to maintain this action.<sup>3</sup>

**C. Plaintiff’s Inequitable Conduct Bars Her Request for an Injunction.**

Plaintiff seeks only equitable relief in the form of an injunction in this action, yet equitable principles clearly preclude her from obtaining the relief she seeks. First, Plaintiff comes to this Court with “unclean hands.” Second, Plaintiff has abused the litigation process and, for this reason too, she should not be permitted to succeed on her request for an injunction.

**1. Plaintiff Has “Unclean Hands.”**

It is well established that one who comes into 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

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<sup>2</sup> Plaintiff’s counsel clearly believed that some connection with this litigation (beyond being a North Dakota resident) was required in order to provide his client with standing, as Plaintiff falsified the only statements in her complaint that seemed to connect her to the Defendant’s business and the City of Fargo. See Mattson Dep. 82-83. Moreover, Plaintiff’s counsel apparently contemplated using different plaintiffs to pursue these claims against the Clinic (see Mattson Dep. 95-96), thus reinforcing that even Plaintiff’s attorney plainly believes that there are some criteria for who should may be a plaintiff in this litigation.

<sup>3</sup> Plaintiff’s complete lack of connection to the claims in this lawsuit makes her unfit even to be a private attorney general acting on behalf of a class of North Dakota women in this cause. In the context of class action lawsuits, where plaintiffs are routinely examined to determine whether they are appropriate representatives of a class of litigants, courts typically consider the plaintiff’s involvement—independent of her attorney—with the litigation. See, e.g., Rothenberg v. Security Mgmt., 667 F.2d 958 (11th Cir. 1982) (stating that factors which may be considered in determining whether a particular plaintiff will fairly and adequately represent the interests of other similarly situated shareholders as required for maintenance of a derivative suit include indications that plaintiff is not true party in interest, plaintiff’s unfamiliarity with the litigation, the degree of control exercised by attorneys over the litigation, and lack of any personal commitment to the action on the part of the representative plaintiff).

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 Plaintiff's 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)). Plaintiff's actions relating to her claims in this lawsuit, however, make clear that she does not come to this Court with clean hands.

For example, 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. See Mattson Dep. 19-20 (stating that she probably handed out more than 500 pamphlets during the time that she was outside of the Clinic); see also Bovard Aff. ¶¶ 14-16 (stating that the attached brochure contains 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). Indeed, although she "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. See Mattson Dep. 15-16. Plaintiff’s actions both undermine her allegations in this lawsuit and make her culpable of behavior seriously harmful to the Clinic and women seeking abortions in North Dakota. See Bovard Aff. ¶¶ 11-18.

In addition, Plaintiff comes to this Court with unclean hands by virtue of the fact that in her complaint she represented herself as engaging in counseling, notwithstanding that at no time was she ever licensed as a counselor in North Dakota. See Mattson Dep. 20-21; see also N.D. Cent. Code § 43-47-06 (“no person may engage in counseling in this state unless that person is a licensed professional counselor or licensed associate professional counselor”). Finally, as discussed below, Plaintiff has grossly abused the litigation process by making false statements in her Supplemental Complaint (see Mattson Dep. 82-83), as well as by predicating her entire Supplemental Complaint and her expedited motion for temporary injunction on Defendant’s redacted brochure—when she had never even seen that brochure, let alone evaluated whether it was false or misleading. See Mattson Dep. 53; see also Mattson Dep. 71-74 (stating that all of the Clinic’s challenged statements were true).

In short, Plaintiff falsely counseled and misled women about the risks associated with abortion in an attempt to dissuade women from seeking abortions. Her wrongful actions relate directly to her claims in this lawsuit in which she purports to be acting in the interest of all North Dakota women seeking informed abortions. Plaintiff’s

falsehoods and misrepresentations regarding abortion risks have caused harm to the Clinic and to its patients. See Bovard Aff. ¶¶ 11-18. Moreover, Plaintiff's allegations regarding the Clinic's dissemination of false and misleading information regarding breast cancer have most certainly harmed the Clinic. See Bovard Aff. ¶¶ 11-13, 17-18; see also Jacobsen v. Pederson, 190 N.W.2d 1, 4 (N.D. 1971) (unclean hands apply when one party's behavior harms another); Singleton v. Wulff, 428 U.S. 106, 108 (1976) (abortion providers traditionally accorded third-party standing on behalf of women seeking abortions).

Accordingly, because Plaintiff has made numerous false representations about the risks associated with abortion during the time this litigation was pending (as well as before that), has lied about her connection to the allegations in this lawsuit, did not herself advise women that breast cancer was a risk of induced abortion during the pendency of this litigation, and has, through her actions, caused serious harm to the Clinic and its patients, Plaintiff should be precluded from seeking an injunction in this case.

## **2. Plaintiff Has Abused the Court Process.**

The "gist of the tort of abuse of process is the misuse or misapplication of legal process to accomplish an end other than that which the process was designed to accomplish." See Volk v. Wisconsin Mortgage Assurance Co., 474 N.W.2d 40, 43 (N.D. 1991). The essential elements of abuse of process are: first, an ulterior purpose; and second, a willful act in the use of the process not proper in the regular conduct of the proceeding. Id.

This case plainly satisfies both of these elements. First, the clear purpose of bringing this lawsuit is to misuse North Dakota’s false advertising statute to allow a non-resident attorney to harass the Clinic and to chill the Clinic’s business of providing abortions to women. Plaintiff’s attorneys approached her about bringing this lawsuit—not vice-versa. See Mattson Dep. 38. It was Plaintiff’s attorneys who initially educated her to the nature of her claims. See Mattson Dep. 36-37, 67-68. Although Plaintiff had never seen the Clinic’s revised brochure (see Mattson Dep. at 53-54), her attorneys nevertheless filed a Supplemental Complaint purportedly based on that brochure, and then insisted on an expedited motion for temporary injunction hearing, at considerable harm to the Clinic. See Bovard Aff. ¶ 18.

Plaintiff believes that abortion should be stopped. Mattson Dep. 76-77. That by itself, of course, does not provide an improper motive for otherwise legitimate litigation. Nevertheless, it is clear from the nature of this lawsuit and the way that it has proceeded that this litigation is improperly designed to stop abortions and to serve as a political vehicle for Plaintiff’s attorney—not for Plaintiff or for the interests of North Dakota women. Plaintiff’s Supplemental Complaint contains patent falsehoods. See Mattson Dep. 82-83.<sup>4</sup> Indeed, Plaintiff’s Supplemental Complaint and Motion for Temporary Injunction were entirely premised on the false representation that Plaintiff had seen the Clinic’s brochure. See Mattson Dep. 53. Plaintiff acknowledges that she has in no way been personally harmed by the Clinic—nor could she, given that she has never even seen the brochure her lawsuit purports to attack. See Mattson Dep. 55.

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<sup>4</sup> Plaintiff’s deposition was taken on March 1, 2001. Since that time, none of Plaintiff’s counsel has seen fit to alert the Court of the false statements, or to amend Plaintiff’s Supplemental Complaint to conform it to the evidence.

Accordingly, because the undisputed facts make clear that this lawsuit was instigated with the ulterior purpose of permitting a non-resident attorney to harass and to chill a legitimate North Dakota business,<sup>5</sup> and because the facts also clearly establish that Plaintiff and her attorneys have acted improperly to accomplish their goals, this Court should for this reason also dismiss Plaintiff's request for an injunction.

**D. AT ALL TIMES DEFENDANT EXERCISED REASONABLE CARE TO ENSURE ITS BROCHURES WERE NOT FALSE OR MISLEADING.**

Summary judgment is also merited because the undisputed facts establish that, at all times, Defendant exercised reasonable care to ensure that the challenged language in its brochures was true and not misleading. North Dakota Century Code provides that:

It is unlawful for any person with intent . . . to make or disseminate . . . any statement . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.

N.D.C.C. § 51-12-08 (emphasis added).

**1. The Clinic reasonably relied on the National Abortion Federation's information in its original brochure.**

The undisputed facts establish that the original brochure language challenged by the Plaintiff was copied by Defendant directly from a National Abortion Federation (NAF) Fact Sheet. See Bovard Aff. ¶ 2. NAF is an organization whose members must meet the highest standards for provision of abortion care in order to be eligible for membership. See Bovard Aff. ¶ 4. The Clinic is a NAF member and has been since it opened in 1998. Bovard Aff. ¶ 3. Given that NAF is regarded by abortion practitioners

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<sup>5</sup> Plaintiff's lead attorney promotes this lawsuit, the alleged connection between abortion and breast cancer, and his law review note, entitled, "The Fit Between the Elements for an Informed Consent Cause of Action and the Scientific Evidence Linking Induced Abortion with Increased Breast Cancer Risk," Kindley, Note, 1998 Wisc. L. Rev. 1595 (1998), on his website, [www.johnkindley.com](http://www.johnkindley.com).

to set the highest standards for abortion-related services, the Clinic exercised more than reasonable care when it relied on the NAF information for its original brochure. See Bovard Aff. ¶¶ 2, 4. Moreover, 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.<sup>6</sup> See Bovard Aff. ¶ 2.

In North Dakota, 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 Benedict v. St. Luke’s Hosp., 365 N.W.2d 499, 502 (N.D. 1985). NAF sets the highest—not even the baseline—standard of care for abortion providers in North Dakota and throughout the United States and, thus, the Clinic exercised reasonable care when it relied on the NAF information in its original brochure. 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). Accordingly, the Court should grant Defendant’s motion for summary judgment as to the Plaintiff’s request for injunctive relief as to the Clinic’s original brochure.

**2. The Clinic exercised reasonable care to ensure that its current brochure contains true and not misleading information.**

Summary judgment is also merited on Plaintiff’s claim for injunctive relief as to the Clinic’s current brochure on the ground that the Clinic exercised reasonable care in crafting its current brochure. The Clinic reasonably consulted with its attorneys to arrive

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<sup>6</sup> After the Clinic notified NAF that it had been sued based on the NAF language, NAF independently removed the challenged language from its Abortion Fact Sheet. See Bovard Aff. ¶ 5.

at the language in its current brochure. See Bovard Aff. ¶ 7. Given that it had been sued over the language formerly used by NAF, the Clinic was careful to choose language that was correct and could not be construed as misleading on the issue of an alleged abortion and breast cancer connection. See Bovard Aff. ¶ 7. It is undisputed that the Clinic searched to find the most up-to-date and trustworthy statements regarding abortion and breast cancer. Id. 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 not only the National Cancer Institute, but also the American Cancer Society, the National Breast Cancer Coalition, and the American College of Obstetricians & Gynecologists Committee on Gynecologic Practice. See Bovard Aff. ¶ 23. Given that these organizations are the leading national 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 Clinic exercised reasonable care in relying on those agencies' statements to ensure that the statements in its current brochure are correct and not misleading.

Previously in this litigation, Plaintiff has pointed to a more recent statement by the National Cancer Institute to support her argument that the Clinic's current brochure is misleading and, by implication, that the Clinic did not exercise reasonable care in drafting its current brochure. Nevertheless, the undisputed facts establish that the Clinic exercised reasonable care when it relied on the most current statement by the National Cancer Institute available to it at the time that it drafted its current brochure. See Bovard Aff. ¶ 8. Although the National Cancer Institute has subsequently modified its statement,

the Clinic's decision to continue to quote the statement is also reasonable. The Clinic's experts have advised it that the quoted National Cancer Institute's statements are both accurate and not misleading as a matter of scientific opinion. See Bovard Aff. ¶ 20. While there may be disputed facts regarding the expert's underlying opinions, it is nevertheless reasonable for the Clinic to rely on the recommendations of renowned experts, in addition to its primary clinical physician. Cf. Benedict, 365 N.W.2d at 502. The Clinic's reliance is especially reasonable in light of the fact that its experts are epidemiologists who specialize in this area of science and whose research is not dependent on funding derived from groups with political positions on abortion. See Bovard Aff. ¶ 22 (stating that she is aware that Plaintiff's expert, Dr. Joel Brind, is a member of several anti-abortion organizations, including the "Culture of Life Foundation," and the American Bioethics Advisory Commission). Indeed, as the Plaintiff acknowledges, her expert believes that the National Cancer Institute is generally spearheading an attempt to mislead women on the issue of breast cancer and abortion. See Mattson Dep. 74. Thus, based on her expert's position, the Plaintiff would allege that the Clinic was misleading the public based on any quote from the National Cancer Institute. Because the Clinic believes the language it has quoted from the National Cancer Institute is accurate and appropriate based on the best medical judgment of both its physician and expert, it is reasonable for the Clinic to continue to rely on the National Cancer Institute's statement. Accordingly, because the Clinic exercised reasonable care to ensure that its current brochure not be either false or misleading, the Court should grant summary judgment on this ground as well.

**E. PLAINTIFF’S CLAIM REGARDING THE CLINIC’S ORIGINAL BROCHURE IS MOOT.**

It is undisputed that the Clinic is no longer using the language in the brochure originally challenged by Plaintiff and that it has no intention of reviving that language. See Bovard Aff. ¶ 6. Plaintiff’s request for an injunction as to the Clinic’s former brochure is moot, therefore, as there no longer exists a 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). This case does not involve public officials and it is not a situation that is capable of repetition, yet evades review—the Clinic has absolutely no intention of reverting to the former language and, if it did, Plaintiff would certainly be able to seek judicial redress. Cf. Sposato, 570 N.W.2d at 213-14 (stating that court may address moot issue only if 1) public officials and matter of public interest is involved or 2) if matter is capable of repetition but evades review); Gosbee, 512 N.W.2d at 452-53 (same).

Accordingly, for this reason also, the Court should grant dismiss Plaintiff’s claim for injunctive relief as to the Clinic’s original brochure.

**F. PLAINTIFF CONCEDES THAT THE CLINIC’S CURRENT BROCHURE IS NOT FALSE.**

Summary judgment is also merited on Plaintiff’s request for injunctive relief on the Plaintiff’s claims that the Clinic’s brochure is untrue. Plaintiff acknowledges that all three of the challenged statements in the Clinic’s current brochure are true. See Mattson Dep. 71-74. Accordingly, because the Plaintiff does not dispute that the Clinic’s statements are not false, Defendant is entitled to summary judgment on those claims.

**G. THE CLINIC IS ENTITLED TO ATTORNEYS' FEES AND EXPENSES THAT POST-DATE PLAINTIFF'S SUPPLEMENTAL COMPLAINT.**

North Dakota Century Code provides:

Allegations and denials in any pleadings in court, made without reasonable cause and not in good faith, and found to be untrue, subject the party pleading them to the payment of all expenses, actually incurred by the other party by reason of the untrue pleading, including a reasonable attorney's fee, to be summarily taxed by the court at the trial or upon dismissal of the action.

N.D. Cent. Code § 28-26-31 (1999). Section 28-26-31 is “the legislature’s effort to penalize the litigants who plead false matters or initiate suits without having a basis in law or in fact for doing so and thereby place an undue burden on their opponents.” See Westchem Agricultural Chems., Inc., 300 N.W.2d 856, 859 (N.D. 1980). An award of fees and expenses pursuant to Section 28-26-31 is discretionary. See, e.g., Westchem, 300 N.W.2d at 859.

North Dakota Century Code also provides:

In civil actions the court shall, upon a finding that a claim for relief was frivolous, award reasonable actual and statutory costs, including reasonable attorney's fees to the prevailing party. Such costs must be awarded regardless of the good faith of the attorney or party making the claim for relief if there is such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in their favor, providing the prevailing party has in responsive pleading alleged the frivolous nature of the claim.

N.D. Cent. Code § 28-26-31 (1999) (emphasis added). If the Court determines that a pleading is frivolous, the award of attorney fees and costs is required. See, e.g., Jensen v. Zuern, 523 N.W.2d 388 (N.D. 1994).<sup>5</sup>

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<sup>5</sup> Prior to deposing Plaintiff on March 1, 2001, the Clinic was unaware that the Plaintiff’s Supplemental Complaint contains false statements and that Plaintiff had never seen the Clinic’s revised brochure. Accordingly, in addition to its motion for summary judgment, the Clinic has also timely moved to amend its answer to plead the frivolous nature of Plaintiff’s Supplemental Complaint as the basis for an award of attorneys’ fees and costs.

As set forth above, Plaintiff has acknowledged that at the time that her supplemental complaint was filed and even up until the time of her deposition on March 1, 2001, she had never seen the Clinic's revised brochure. See Mattson Dep. 53. Plaintiff also acknowledged that her Supplemental Complaint contains false statements regarding her place of residence and her occupation. See Mattson Dep. 82-83.

Plaintiff's blatant abuses of the judicial process simply cannot be excused. There is no reasonable cause for Plaintiff not to have reviewed and corrected false statements in her Supplemental Complaint, just as there was no reasonable cause for Plaintiff to have pursued her claim for injunctive relief as to a document she had never even seen.

Although "good faith" has a subjective component, see, e.g., Larson v. Baer, 418 N.W.2d 282, 289 n.7 (N.D. 1988) ("Good faith shall consist in an honest intention to abstain from taking any unconscientious advantage of another even through the forms or technicalities of law"), it clearly has an objective component as well. See, e.g., Larson, 418 N.W.2d at 289 n.7 (defining good faith as having subjective component considered "together with an absence of all information or belief of facts which would render the transaction unconscientious."); see also Thompson v. Associated Potato Growers, Inc., 610 N.W.2d 53 (N.D. 2000) (applying objective good faith standard to evaluate employers decision to terminate employee); State v. Van Beek, 591 N.W.2d 112 (N.D. 1999) (applying objective good faith standard to evaluate whether officer should have known search was illegal). It is not objective good faith for a Plaintiff to allow herself to be the figurehead for a lawsuit that is designed for her attorneys to advance their own political agenda at the expense of a legitimate North Dakota business. It is plainly not objective good faith for a litigant to misrepresent her relationship to her claims or to make false statements in

pleadings filed in court, when all information and knowledge of facts would objectively establish that it was unconscientious to do so. And, of course, this Court may determine that the Plaintiff's supplemental complaint was frivolous without any regard either to the Plaintiff's or her attorneys' good faith. See N.D.C.C. § 28-26-01.

Accordingly, because Plaintiff made false statements in her Supplemental Complaint and predicated her request for injunctive relief as to the Clinic's revised brochure on the false premise that she had seen and formed judgments as to the Clinic's brochure, this Court should award the Clinic its reasonable attorneys fees and expenses for all proceedings that post-date and are related to the Plaintiff's Supplemental Complaint, including Defendant's Opposition to Plaintiff's Motion for Temporary Injunction, the hearing on Plaintiff's Motion, expert witness fees, Defendant's Opposition to Plaintiff's Motion for Protective Order from Deposition, depositions, as well as this motion. All of these expenses would not have been incurred but for Plaintiff's false Supplemental Complaint. Accordingly, in addition to granting the Clinic's motion for summary judgment for all of the reasons outlined above, the Court should award the Clinic its reasonable fees and expenses.

### **III. CONCLUSION**

For each of the reasons set forth above, the Clinic respectfully requests that this Court grant its motion for summary judgment. The undisputed facts establish that Plaintiff does not have standing to pursue her claims and, moreover, her inequitable behavior precludes her from invoking this Court's equitable power to grant injunctive relief. The Clinic at all times has exercised reasonable care to ensure that the information it provides in its brochures is true and not misleading. The Plaintiff's claims regarding

the Clinic's original brochure are moot, and Plaintiff has acknowledged that the statements in the Clinic's current brochure are true. Accordingly, this Court should grant the Clinic summary judgment as to Plaintiff's claims for injunctive relief pursuant to North Dakota Century Code Section 51-14-12. Finally, because the Plaintiff's supplemental complaint contains false statements made without reasonable cause and not in good faith, the Court should award the Clinic its reasonable attorneys' fees and expenses.

Dated this \_\_\_\_\_ day of April, 2001.

Respectfully submitted,

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