

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JUDGE RAKOFF

-----X
BETWEEN THE LINES PRODUCTIONS, LLC,
(a California limited liability company)

13 CV 3584
Civil Action No. _____

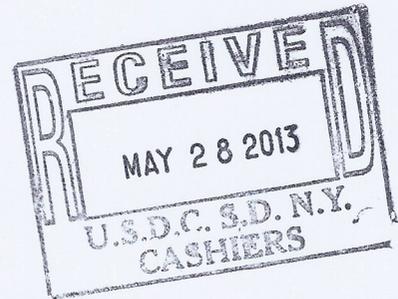
Plaintiff,

-vs-

**DEMAND FOR
JURY TRIAL**

LIONS GATE ENTERTAINMENT CORP.,
(a British Columbia corporation traded on NYSE)
SUMMIT ENTERTAINMENT, LLC
(a Delaware limited liability company)

Defendants.
-----X



ANTI-TRUST COMPLAINT

COMES NOW the Plaintiff, BETWEEN THE LINES PRODUCTIONS, LLC, a limited liability company organized under the laws of the State of California, by and through its counsel, James H. Freeman, Esq. of JH FREEMAN LAW, 3 Columbus Circle, FL 15, New York, New York 10019-8716, to state its causes of action at law and in equity as against Defendants LIONS GATE ENTERTAINMENT CORP., a foreign corporate entity organized under the laws of Vancouver, British Columbia (Canada) and publicly traded on the New York Stock Exchange [NYSE: LGF], and SUMMIT ENTERTAINMENT, LLC, a limited liability company organized under the laws of the State of Delaware (collectively referred to herein as the “Defendants”).

INTRODUCTION

This action arises under federal antitrust laws in the context of the worldwide motion picture industry (the “movie industry” or the “WMPI”). Defendant LIONSGATE ENTERTAINMENT CORP. (“LIONSGATE”),¹ a corporate entity of foreign origin which currently trades on the New York Stock Exchange, has become a dominant market force in the movie industry during the last five years on the strength of a fresh WMPI business model known as the “tentpole franchise.”

Beginning in 2001 with the theatrical debut of the highly successful movie series *Harry Potter*, the tentpole franchise has proven to be the most lucrative way of doing business for largescale (i.e., billion-dollar-plus annual revenue) movie studios. This business model contemplates a *series* of motion pictures as one “brand” or single property under which all economic *and* speech activity can be consolidated, owned, controlled and monetized by the studio.

But as this case demonstrates, the newfangled model – which actually has roots in 19th century popular entertainment - has the potential to threaten the existence of the already limited “Fair Use Zones” populated by independent filmmakers, parodists and other “counter-cultural” artists who *create* separate or derivative works that may be related to, inspired by or comment upon the pop culture events that dominate the national Cineplex and, by extension: the attitudes, perspectives and behaviors of the populace.

Defendants’ anticompetitive conduct sets the benchmark example for why James Madison and Thomas Jefferson were apprehensive in the months leading up to the Philadelphia Convention about granting authors even limited copyright monopolies over their works: the

¹ Defendant SUMMIT ENTERTAINMENT, LLC (“SUMMIT”) is a fully-integrated and wholly-owned division or department of LIONSGATE. Defendants LIONSGATE and SUMMIT are therefore referred to throughout this Complaint as one common enterprise: “Defendants”

Chief Architects of the U.S. Constitution feared that powerful, consolidated enterprises would abuse such statutory privileges as a means to suppress the voices of ordinary citizens. And that's exactly what's happening here.

Defendants' first major offering in the movie industry using a tentpole franchise model - *The Twilight Saga* - has been propagated by a *high degree* of reckless disregard for this Nation's copyright and trademark laws through what media observers have called Defendants' "ridiculous-to-insane overreaches of intellectual property law." [Ex. K (BTL_000583)] *The Twilight Saga* is a five-part series of feature-length motion pictures, released from November 2008 through November 2012, that have collectively generated over \$3.3 billion in worldwide box office revenues derived from exploiting their limited copyright monopoly in the "A Market," which Plaintiff defines in Count III² as the marketplace of original intention targeted to consumers of *teen fantasy romance*.

But Defendants have not been content with dominating the discussion of fantasy romance in movie theaters. They have also sought to monopolize the conversation in adjacent (or downstream) anti-trust markets in which speech content is used to comment upon or criticize Defendants' "A Market" offerings through the creation of novel works that are either inspired by *The Twilight Saga* (defined herein as the "JX Market") or, in the case of Plaintiff, repulsed by *The Twilight Saga* (defined herein as the "Z Market"). Defendants have achieved the monopolization of these "Fair Use Zones" through a highly oppressive intellectual property ("IP") enforcement policy that uses sham C&D Notices and a compendium of prohibited trademark / servicemark registrations to chill speech in the "JX Market" and exclude ALL competition from the "Z Market."

In the case at bar, Plaintiff *Between the Lines Production, LLC*, a Los-Angeles based

² See Chart on page 112 of this Complaint for "Quickview Reference" of Anti-Trust Markets.

independent filmmaker, produced a feature-length motion picture entitled *Twiharder* through its own independent methods and means of production, based on an 100% original copyrighted screenplay. Plaintiff's motion picture, which was marketed with complete transparency as a "parody, " utilized Defendants' vampire romance movie franchise as an object of ridicule, criticism and sociopolitical commentary. None of the actual cinematographic, audio-visual or musical content (i.e., "1s and 0s") from *any* of Defendants' copyrighted motion pictures, images or soundtracks was used in Plaintiff's motion picture. The actors featured in Plaintiff's film portrayed hyper-exaggerated caricatures from *The Twilight Saga* movies and lampooned expressive elements embodied in Defendants' pre-existing works through imitative reference. The title of Plaintiff's motion picture, *Twiharder*, is itself a rhetorical parody of the very term used to describe an obsessed teenage fan of the franchise, known as a "Twihard."

Beginning in March 2012, several major WMPI distributors expressed interest in licensing the Plaintiff's motion picture *Twiharder* for worldwide distribution so as to coincide with the Defendants' theatrical release of *The Twilight Saga: Breaking Dawn (Part Two)* in November 2012. As in the art of comedy, the timing of content delivery in the movie business is everything. This was particularly true here given that: (a) the relevance and success of a parodical work is directly proportional to the widespread public awareness of the object being parodied; (b) no other feature-length parody motion picture was scheduled to be released in conjunction with Defendants' exploitation of *The Twilight Saga: Breaking Dawn (Part Two)*.

From April-July 2012, all reasonable minds who viewed *Twiharder*, or its 90-second trailer, or any of its supporting marketing materials, were left with the instantaneous and unmistakable impression that Plaintiff's feature-length film was a parody / comedic spoof of *The Twilight Saga* movies. Consistent with their own review and analysis of a *Twiharder* screening, a litigation attorney for GRAVITAS VENTURES, the WMPI distributor who offered

Plaintiff a Licensing Agreement; a risk assessment attorney for CHUBB INSURANCE, an E&O Insurer who offered Plaintiff an E&O Insurance Policy; and DONALDSON + CALLIF, an entertainment law firm founded by “Fair Use” expert Michael C. Donaldson, Esq. and retained by Plaintiff to provide a “Fair Use” Legal Opinion, ALL unanimously concluded that the Plaintiff’s motion picture *Twiharder* constituted “Fair Use” under the four-factor test codified by the legislature in the COPYRIGHT ACT of 1976, 17 U.S.C. § 107.

But alas, Hollywood is a “small town” and word about *Twiharder*’s impending distribution deal reached Defendants. As evidenced by the public record, the affirmative defense of “Fair Use,” as codified by Section 107 and as applied by federal courts for over 35 years, has done little to deter Defendants from asserting serious charges of infringement against a very large universe of potential infringers. Rather than providing any deterrence effect, the unpredictability of the “Fair Use” doctrine has granted Defendants an unfettered license to threaten scores of independent artists with generic, stock allegations of copyright infringement and trademark infringement.

On June 27, 2012, Plaintiff became just one more victim in a long line of independent auteurs to receive a sham “cease-and-desist” C&D Notice from Defendants. Within days of disclosing the communication to its contractual offerors, the WMPI distributors and E&O insurers unceremoniously revoked their offers to deal with Plaintiff, whose feature-length motion picture *Twiharder* was at all times thereafter excluded from distribution in the WMPI.

After Plaintiff was notified of formal revocation, the attorney for the WMPI distributor explained to Plaintiff that the merits of Defendants’ allegations (or lack thereof), as contained in Defendants’ C&D Notice, were entirely irrelevant to the distributor’s revocation decision. As a matter of industry custom and practice, *the mere fact* that Defendants sent a C&D Notice was enough to exclude Plaintiff’s motion picture from the ONLY market networked into the

ordinary channels of essential distribution (e.g., theatrical box-office release, packaged home media, video-on-demand, pay-per-view, or electronically stored transmission).

Defendants' false claims of trademark and copyright infringement against Plaintiff, which have continued unabated through the filing of this Complaint, are ALL based on a vexatious legal strategy that seeks to collapse every conceivable intellectual property right granted by copyright or trademark law (e.g., motion picture content, single-work titles, movie series titles, images, compositions, slogans, logos, trade dress, phrases, symbols, characters, themes) into ONE omnipotent "movie brand." After consolidating all of its statutory interests into a single "bundle" of proprietary rights, Defendants then make generic allegations of "infringement" or "tarnishment" based on their purported right to protect the entire "brand." In the case at bar, Defendants have registered no less than a *dozen* names for its series franchise, thereby multiplying the universe of potential infringers exponentially. This approach, which is clearly evident on the face of the sham C&D Notices and the Principal Register, manifests Defendants' intent to utilize the "tentpole" model as a leveraging mechanism to prop up a full-scale, 360-degree IP monopoly in which all the statutory rights granted by the COPYRIGHT ACT simply become *interchangeable* with (and/or subsumed by) the statutory privileges granted by the TRADEMARK ACT.

To illustrate, Defendants' highly sophisticated IP counsel in this matter has repeatedly claimed in writing that Plaintiff's copyrighted feature-length motion picture constitutes "*dilution by tarnishment*" of the "*well-known wholesomeness*" of Defendants' copyrighted feature-length motion pictures under Section 1125(c) of the Lanham Act.³ In other words,

³ See, e.g., Ex. A (BTL_000023) (C&D, dated July 24, 2012, wherein Defendants claim that: "The [Plaintiff's] Movie looks low budget and depicts scenes that appear sexually suggestive and tawdry, constituting dilution through harmful tarnishment of Summit's valuable intellectual property rights"); [Ex A. (BTL_000034)] (C&D, dated January 15, 2013, wherein Defendants claim that "*the intentionally sexual vulgar, and tawdry nature of the*

there's not a single trademark interest in the equation of this analysis; Defendants blindly allege that Plaintiff's copyrighted motion picture violates the TRADEMARK ACT because the expressive content of the motion picture itself, which enjoys protection under the COPYRIGHT ACT, dilutes the expressive content of the Defendants' copyright interests. This distorted view of American intellectual property jurisprudence goes beyond a fundamental misapprehension of black-letter U.S. law;⁴ it drives a stake deep into the heart of the First Amendment.

As set forth in Count I of this Complaint, Plaintiff seeks a declaration from the Honorable Court that the feature-length motion picture *Twiharder* should be accorded full protection under the guarantees of the First Amendment to the U.S. Constitution, and that Plaintiff's copyrighted work constitutes a non-infringing "Fair Use" of whatever exclusive rights Defendants have asserted against Plaintiff under the COPYRIGHT ACT of 1976.

As set forth in Count II of this Complaint, Plaintiff seeks compensatory damages from Defendants for violation of Section 512(f) of the Digital Millennium Copyright Act by intentionally destroying Plaintiff's economic relations with WMPI distributors and E&O Insurers in June-July of 2012, thereby foreclosing any possibility of bringing *Twiharder* to market in a timely and relevant manner. Defendants' sophisticated IP counsel conflated the copyright infringement allegations with trademark dilution allegations because counsel actually knew that there was never any cognizable *copyright* infringement claim to be made. Even when Plaintiff agreed to change the title of the motion picture, surrender its website and change all of the marketing materials (which would have eliminated any potential concerns Defendants

Twiharder film tarnishes the essential, intrinsic, and well-known wholesomeness of the Twilight Motion Pictures.") (emphasis added)

⁴ See 4 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §24:90 (4th ed. 2008) ("[T]arnishment caused merely by an editorial or artistic parody which satirizes plaintiff's product or its image is not actionable under an anti-dilution statute because of the free speech protections of the First Amendment....").

had of “confusion” with respect to the marketing of the film), Defendants abjectly refused to deal, making believe like Plaintiff’s motion picture was an actual re-dramatization of *The Twilight Saga* rather than a parody.

As set forth in Count III of this Complaint, Defendants achieved monopoly power in the “Z Market” through use of oppressive C&D tactics to shut down competition, and through prohibited registrations of trademark / servicemarks that were collectively designed to convey the false illusion of “strength” upon dealing with potential competitors. Defendants then unlawfully used this monopoly power to freeze Plaintiff out of the “Z Market,” thereby causing economic injury to Plaintiff directly and having anticompetitive effect on the marketplace at large by limiting the choice of consumers to view only those feature-length parodies (or other “Z Market” offerings) which were “authorized” by Defendants.

As set forth in Count IV of this Complaint, Plaintiff seeks to challenge select provisions of the COPYRIGHT ACT of 1976 on constitutional grounds as overbroad and void for vagueness. The *ad hoc* judicial enforcement of the Fair Use doctrine, which was what Congress had intended back in ‘76, has only contributed to the *unpredictability* of the “Fair Use” analysis, which means the statute is not serving the purpose of Law: to provide a predictable indicator for how people should act. So long as no clear statutory guideline exists, and each judicial holding carries narrow precedential value, dominant market players in the WMPI may operate to suppress the diversity of voices represented by independent filmmakers - who are “mere” *copyright* holders in this novel “tentpole” paradigm and whose limited resources are barely sufficient to manifest their artistic voice, let alone ward off the oppressive litigation tactics of global *brand* managers.

As per Count V, many of the trademark / servicemark registrations that Defendants purport to own in connection with *The Twilight Saga* franchise, such as multiple registrations

for the marks TWILIGHT, NEW MOON, and ECLIPSE, are NOT even registrable under the USPTO's own published rules and are obviously foreclosed from registration by over 50 years of bedrock judicial precedent. Said marks are mere titles or portions of titles of *single-works* within a larger series and are NOT used by Defendants in commerce to describe the series. How they even came to be registered at all is perhaps beyond the scope of this lawsuit, but Plaintiff submits that the Honorable Court cannot sustain such registrations without compromising the integrity of the USPTO's federal trademark registration system.

Finally, under a theory of *restorative justice*, Plaintiff seeks the Honorable Court's assistance in helping LIONSGATE become part of the constructive solution to the very problem their anticompetitive conduct has brought to light: which is to spearhead an expedient and legitimate effort to re-codify the common law doctrine of "Fair Use" so as to clearly define the guidelines of interaction between the rights holder and the audience-member-turned-rights holder.

Unlike all of those other systems of government that have come and gone over the last 225 or so years, the "American Experiment" of 1789 works because it is founded on the indigenous nature of human beings to participate in a never-ending "Call-and-Response", whether through the interactions of Government-Voter or Filmmaker-Fan. It is *circular* dynamic in which progress in the useful Arts generates from lots of little Responses becoming their own Calls. If the Powers that Be assume the Call position but work to stifle the Responses, then the wheel of innovation stops spinning and America moves closer to all those other systems of government. The wheel is jammed up because of obsolete laws based on 20th century technology. But rather than re-inventing its own wheel, LIONSGATE should work with the one James Madison provided and show the world how wonderfully it can spin.

TABLE OF CONTENTS

JURISDICTION & VENUE

A. SUBJECT MATTER JURISDICTION	15
B. PERSONAL JURISDICTION	16
C. VENUE	16

PARTIES

A. PLAINTIFF	18
B. DEFENDANTS	19
(1) LIONSGATE ENTERTAINMENT CORPORATION.....	19
(2) SUMMIT ENTERTAINMENT, LLC.....	19
(3) DEFENDANTS' COMMON ENTERPRISE.....	20

MOVIE INDUSTRY OVERVIEW

A. LEGAL PROTECTION	26
(1) "MOTION PICTURES".....	26
(2) "FEATURE-LENGTH FILMS".....	26
(3) FIRST AMENDMENT PROTECTION.....	27
(4) SCOPE OF U.S. COPYRIGHT ACT.....	28
(5) SCOPE OF U.S. TRADEMARK ACT.....	29
B. INDUSTRY COMPONENTS	30
(1) OVERVIEW.....	30
(2) WMPI DISTRIBUTION.....	30
(3) WMPI MARKETING.....	31
C. BUSINESS MODELS	32
(1) "BLOCKBUSTER-SEQUEL" PARADIGM (1975-2000).....	32
(2) "TENTPOLE" FRANCHISE (2001-PRESENT).....	33

MOTION PICTURE FEATURES

A. THE TWILIGHT SAGA	38
(1) FEATURE RELEASES.....	38
(2) "TWHARD" FANS.....	39
(3) CRITICAL REACTION.....	41
B. FEATURE FILM PARODIES	42
(1) <i>VAMPIRE SUCKS</i> (2010).....	42
(2) <i>BREAKING WIND</i> (2012).....	45
C. <i>TWIHARDER</i>: THE SPOOF	47
(1) ORIGIN OF THE <i>TWIHARDER</i> CONCEPT.....	47
(2) PRODUCTION OF "TWHARDER".....	49
(3) SERIOUS NATURE OF <i>THE TWILIGHT SAGA</i>	50
(4) PARODICAL ELEMENTS OF <i>TWIHARDER</i>	52
(5) PROMOTION OF <i>TWIHARDER</i>	55

ANTI-COMPETITIVE CONDUCT

A. CONTINUING VIOLATIONS	57
(1) ORDINARY COURSE OF BUSINESS PRACTICE	57
(2) PATTERN OF PREDATORY CONDUCT	57
(3) EARLY WARNING SIGNS	59
(4) "RIDICULOUS-TO-INSANE OVERREACHES OF IP LAW"	60
B. DISTRIBUTION OFFER	62
(1) GRAVITAS VENTURES.....	62
(2) LICENSING AGREEMENT	63
C. E&O INSURANCE	65
D. "FAIR USE" LEGAL OPINION	66
(1) DONALDSON & CALLIF	66
(2) CHUBB'S APPROVAL	68
E. CEASE-AND-DESIST	68
(1) DEFENDANTS' INITIAL C&D.....	68
(2) PLAINTIFF'S INITIAL RESPONSE TO THE C&D	69
F. REVOCATION & LOCK OUT	69
(1) CHUBB'S REVOCATION.....	69
(2) GRAVITAS' REVOCATION	69

COUNT I - DECLARATORY JUDGMENT OF "FAIR USE," 17 U.S.C. § 107

A. PLAINTIFF'S STANDING	72
(1) COPYRIGHT CLAIMANT	72
(2) COPYRIGHT AUTHORSHIP	72
B. CASE OF ACTUAL CONTROVERSY: "FAIR USE"	73
(1) DEFENDANTS' CEASE-AND-DESIST	73
(2) DECLARATORY JUDGMENT STANDARD, 28 U.S.C. §§ 2201, 2202	74
(3) FIRST AMENDMENT RIGHTS.....	75
(4) "FAIR USE" STANDARD, 17 U.S.C. § 107	76
C. PURPOSE AND CHARACTER OF USE	76
(1) RADICALLY TRANSFORMATIVE	76
(2) FEATURE FILM ≠ COMMERCIAL ADVERTISEMENT.....	78
D. NATURE OF COPYRIGHTED WORK	80
(1) A POPULAR CULTURE "PHENOMENON"	80
(2) PROTECTABLE ELEMENTS	80
(3) NON-COPYRIGHTABLE ELEMENTS.....	81
E. SUBSTANTIALITY OF MATERIAL USED	82
(1) NO CONTENT SAMPLING	82
(2) ORDINARY OBSERVER TEST	83
(3) INDEPENDENT CREATION	84
F. EFFECT ON POTENTIAL MARKET	85
(1) NO MARKET DISPLACEMENT	85
(2) <i>DE FACTO</i> ENFORCEMENT OF "MORAL RIGHTS"	86

COUNT II - VIOLATION OF DIGITAL MILLENIUM COPYRIGHT ACT, 17 U.S.C. § 512(f)

A. STATUTORY LANGUAGE.....88

B. PLAINTIFF’S STANDING UNDER 17 U.S.C. § 512(f)88

C. KNOWINGLY FALSE REPRESENTATIONS89

(1) FALSE DENIALS OF PARODY 90

(2) FALSE ACCUSATIONS OF “WHOLESALE COPYING” 92

(3) INTENTIONAL DISTORTION OF LANHAM ACT 94

D. ABSENCE OF LITIGATION PRIVILEGE95

E. CAUSATION / INJURY96

COUNT III - VIOLATION OF SHERMAN ANTI-TRUST ACT, 15 U.S.C. § 2

A. ANTITRUST LAWS99

(1) STATUTORY LANGUAGE..... 99

(2) CONGRESSIONAL PURPOSE 99

B. INTERPLAY B/W ANTI-TRUST AND COPYRIGHT 100

(1) CONSTITUTIONAL CONCERNS.....100

(2) LACK OF IMMUNITY FROM ANTITRUST LIABILITY102

C. ANTI-TRUST STANDING..... 103

(1) INJURY TO BUSINESS OR PROPERTY.....103

(2) DIRECT CAUSATION.....104

(3) INJURY OF THE TYPE THE ANTITRUST LAWS WERE INTENDED TO PREVENT105

(4) LACK OF REMOTENESS / QUANTIFIABLE DAMAGES.....107

(5) “EFFICIENT ENFORCER”109

D. ELEMENTS OF SECTION 2 MONOPOLIZATION 109

(1) OVERVIEW.....109

(2) MARKET POWER.....110

E. RELEVANT ANTITRUST MARKETS 110

(1) “A MARKET” (NARRATION)113

(2) “B MARKET” (EXPOSITION)116

(3) “JX MARKET” (JUXTAPOSITION).....118

(4) “Y MARKET” (DESCRIPTION).....120

(5) “Z MARKET” (ARGUMENTATION)122

F. MARKET SHARE..... 127

(1) “A MARKET” SHARE.....127

(2) “Z MARKET” SHARE128

G. BARRIERS TO MARKET ENTRY 131

(1) ACCESS TO DISTRIBUTION CHANNELS.....131

(2) SUPERIOR MARKET POSITION.....131

H. MONOPOLY LEVERAGING 133

(1) SINGLE COPYRIGHT MONOPOLY133

(2) ENTERPRISE COPYRIGHT MONOPOLY133

(3) COPYRIGHT MONOPOLY LEVERAGING VIA TRADEMARK ACT134

(4) EXCLUSIONARY CONDUCT.....137

(5) DEPRIVATION OF “ESSENTIAL FACILITIES”139

(6) REFUSAL TO DEAL	142
I. WILFUL ACQUISITION OF MARKET POWER.....	143
(1) STEP ONE: TARGETING THE "A MARKET"	143
(2) STEP TWO: MONOPOLIZE THE "B MARKET"	144
(3) STEP THREE: CHILL THE "JX MARKET"	145
(4) STEP FOUR: MONOPOLIZE THE "Z MARKET"	146
(5) STEP FIVE: MAINTAIN "A" TO "Z" MONOPOLY.....	146
J. ABSENCE OF VALID BUSINESS JUSTIFICATION	147
(1) TWIHARDER = FAIR USE.....	147
(2) NO PRO-COMPETITIVE BENEFITS.....	148
(3) LACK OF CONSUMER CHOICE.....	148
(4) ABSENCE OF TRUE ECONOMIC INCENTIVE	151

COUNT IV - CONSTITUTIONAL CHALLENGE RE: "FAIR USE" DOCTRINE
--

A. PLAINTIFF'S STANDING.....	158
(1) CASE OF ACTUAL CONTROVERSY.....	158
(2) CONSTITUTIONAL QUESTION	158
(3) MATTER OF GREAT PUBLIC INTEREST	160
B. OVERBREADTH	160
(1) STANDARD FOR CONSTITUTIONAL CHALLENGE	160
(2) OVERBROAD STATUTORY LANGUAGE.....	161
(3) COPYRIGHT MONOPOLY CANNOT EXTEND TO FEATURE PARODY.....	163
(4) PRESUMPTION OF INFRINGEMENT	164
(5) TIME, PLACE AND MANNER RESTRICTIONS.....	165
(6) IMITATIVE REFERENCE IS PROTECTED FREE SPEECH.....	167
(7) NO COMPELLING STATE INTEREST TO IMPOSE PRESUMPTION OF INFRINGEMENT	169
(8) LESS DRASTIC ALTERNATIVES AVAILABLE	169
C. VOID FOR VAGUENESS.....	170
(1) STANDARD FOR CONSTITUTIONAL CHALLENGE	170
(2) VAGUE STATUTORY LANGUAGE.....	171
(3) ABSENCE OF SPECIFIC GUIDELINES.....	171
(4) ABSENCE OF STATUTORY REFERENCE TO "PARODY"	173
(5) SELECTIVE JUDICIAL ENFORCEMENT.....	174
(6) "COMMERCIAL [Ad] SPEECH" VS. "FOR-PROFIT SPEECH"	176
(7) ECONOMIC BENEFITS DERIVED FROM NARROW CONSTRUCTION.....	178

COUNT V - CANCELLATION OF TRADEMARKS, 15 U.S.C. §§ 1064, 1119
--

A. STATUTORY LANGUAGE.....	180
B. CASE OF ACTUAL CONTROVERSY	181
(1) DEFENDANTS' CEASE & DESIST NOTICE.....	181
(2) PLAINTIFF'S ECONOMIC INJURY.....	182
C. IDENTITY OF THE CHALLENGED MARKS	184
(1) UNIVERSE OF VOIDABLE MARKS	184
(2) "MOVIE TITLE MARKS"	184
(3) TWIHARD '325	185

D. REGISTRATION OF “MOVIE TITLE MARKS”	187
(1) TWILIGHT ‘386 [CLASS 009].....	187
(2) TWILIGHT ‘560 [CLASS 041/045]	187
(3) TWILIGHT ‘079 [CLASS 045].....	188
(4) NEW MOON ‘792 [CLASS 045]	188
(5) NEW MOON ‘455 [CLASS 041]	188
(6) THE TWILIGHT SAGA ‘682 [CLASS 045]	189
E. GROUNDS FOR CANCELLATION (“MOVIE TITLE MARKS”)	189
(1) PROHIBITED REGISTRATIONS OF SINGLE-WORK TITLES	189
(2) PROHIBITED REGISTRATION OF MULTIPLE TITLES TO IDENTIFY <u>SERIES</u>	192
(3) GROSS DISPARATE TREATMENT BY USPTO	193
(4) DEFENDANTS’ ACTUAL USE OF “THE TWILIGHT SAGA” AS SERIES TITLE	195
(5) LIKELIHOOD OF CONFUSION RE: MORE THAN ONE SERIES TITLE	197
(6) “RUNNING UP THE SCORE” ON THE PRINCIPAL REGISTER	198
(7) MOVIE TITLES ARE <u>NOT</u> “SERVICE PROVIDERS” [CLASS 041/CLASS 045].....	202
(8) “LICENSING OF MERCHANDISE” IS <u>NOT</u> ACCEPTABLE SERVICEMARK ID [CLASS 045]	204
(9) “TWILIGHT” IS INHERENTLY GENERIC	205
(10) “THE TWILIGHT ZONE”	206
F. (LATER) REGISTRATION OF TWIHARD ‘325	209
(1) PLAINTIFF’S DOMAIN REGISTRATION (“TWIHARDER.COM”)	209
(2) PLAINTIFF’S FIRST TRADEMARK APPLICATION (“TWIHARDER”)	209
(3) SUMMIT’S TRADEMARK APPLICATION (“TWIHARD” – CLASS 025)	209
(4) PLAINTIFF’S SERVICEMARK REGISTRATION (“TWIHARDER”).....	210
G. GROUNDS FOR CANCELLATION (TWIHARD ‘325)	212
(1) “TWIHARD” IDENTIFIES <u>FANS</u> OF SERIES, NOT <u>SOURCE</u> OF SERIES	212
(2) CREATOR OF <i>THE TWILIGHT SAGA</i> DISCLAIMS MARK AS “AWFUL”	212
(3) ANTI-COMPETITIVE REGISTRATION	214

PRAYER FOR RELIEF

COUNT I	216
COUNT II	216
COUNT III	217
COUNT IV	218
COUNT V	219

JURISDICTION AND VENUE

A. SUBJECT MATTER JURISDICTION

1. This action arises under the laws of the United States and all counts set forth herein may be entertained under the original jurisdiction of the Honorable Court pursuant to 28 U.S.C. § 1331 [federal question].

2. The Court has original jurisdiction over Count I pursuant to the First Amendment to the U.S. Constitution (Amend. I); the DECLARATORY JUDGMENT ACT, 28 U.S.C. §§ 2201, 2202; 28 U.S.C. 1338(a); and under the COPYRIGHT ACT OF 1976, 15 U.S.C. §§ 101, et seq.

3. The Court has original jurisdiction over Count II pursuant to 28 U.S.C. § 1338(a); under the COPYRIGHT ACT OF 1976, 15 U.S.C. § 101, et. seq.; and the DIGITAL MILLENIUM COPYRIGHT ACT, 17 U.S.C. § 512(f).

4. The Court has original jurisdiction over Count III pursuant to 28 U.S.C. § 1367(a); Section 2 of the SHERMAN ANTITRUST ACT, 15 U.S.C. § 2; and under Sections 4 and 16 of the CLAYTON ANTITRUST ACT, 15 U.S.C. §§ 15, 26.

5. The Court has original jurisdiction over Count IV pursuant to the First Amendment to the U.S. Constitution (Amend. I); the DECLARATORY JUDGMENT ACT, 28 U.S.C. §§ 2201, 2202; 28 U.S.C. § 2403 [constitutional question]; 28 U.S.C. §§ 1338(a); and under the COPYRIGHT ACT OF 1976, 15 U.S.C. §§ 101, 106-107.

6. The Court has original jurisdiction over Count V pursuant to the DECLARATORY JUDGMENT ACT, 28 U.S.C. §§ 2201, 2202; 28 U.S.C. §§ 1338(a); and under the LANHAM (TRADEMARK) ACT OF 1946, 15 U.S.C. §§ 1051, 1065, 1119, 1125.

B. PERSONAL JURISDICTION

7. Defendant LIONS GATE ENTERTAINMENT CORPORATION (“LIONSGATE”) is a publicly traded North American company listed on the New York Stock Exchange [NYSE: LGF] with corporate executive offices located within this Judicial District at 75 Rockefeller Plaza, New York, NY 10019, 16th Floor. [Ex. E (BTL_000233)]

8. Defendant SUMMIT ENTERTAINMENT, LLC (“SUMMIT”) is a fully-integrated agency, department, division and/or wholly-owned subsidiary of LIONSGATE which transacts business within this Judicial District. The interstate trade and commerce involved and affected by the alleged violations of the antitrust laws were carried on, in part, within this District and at least some of the unlawful acts described herein were performed or made effective within this Judicial District.

C. VENUE

9. Venue is proper under 28 U.S.C. §§ 1391(b) and (c) in this case because Defendants LIONSGATE and SUMMIT routinely transact business in this Judicial District and, upon information and belief, a substantial part of the events or omissions giving rise to the offense of monopolization and anti-competitive conduct that is the subject of the action took place within this Honorable Court’s jurisdiction.

10. Venue is convenient for Defendant LIONSGATE because it maintains corporate executive offices in this Judicial District at 75 Rockefeller Plaza, New York, NY 10019, 16th Floor. Moreover, Defendant LIONSGATE is a publicly traded company on the New York stock exchange, making this venue the ideal location for LIONSGATE to defend suit.

11. Venue is convenient for Defendant SUMMIT because, in addition to being fully-integrated as a mere adjunct of LIONSGATE, it has routinely litigated in this Judicial District

on prior occasions based on its substantial contacts to this Judicial District.⁵

12. Venue is proper for the named Plaintiff in this action because Plaintiff at all times intended to distribute its copyrighted motion picture that is the subject of the action to consumers within this Judicial District. Plaintiff continues to seek access to distribution and continues to market its parody motion picture to consumers within this Judicial District via Plaintiff's website.

13. Venue is convenient in this Judicial District because all or substantially all of the relevant documents in this matter have been or can be transcoded into electronic format and therefore readily available for discovery in this Judicial District. Material witnesses who Plaintiff seeks to depose are likely to be located within this Judicial District where Defendant LIONSGATE maintains a corporate executive office. The individual members / representatives of Plaintiff, John Gearries and Christopher Sean Friel, are available to be deposed in the State of New York if necessary.

⁵ See Summit Entertainment, LLC v. Bath & Bodyworks Brand Management, Inc., 2011 WL 2649973 *2 (C.D. Cal. July 5, 2011) (finding that Summit has “substantial connections to the New York forum” because Summit “conducts routine business in New York and has brought suits in New York in the past.”)

PARTIES

A. PLAINTIFF

14. Plaintiff BETWEEN THE LINES PRODUCTIONS LLC (“Plaintiff”) is a limited liability company organized under the laws of the State of California on or about February 24, 2010 with principal place of business in Los Angeles, California. [Ex. D (BTL_000211)]

15. The individual members and owners of Plaintiff-company are John Andrew Gearries (“Gearries”) and Christopher Sean Friel (“Sean”), each of whom are U.S. citizens and residents of the State of California. [Ex. D (BTL_000212)]

16. Plaintiff is an independently-owned and operated entertainment company engaged in the business of developing and producing motion pictures for domestic and international distribution.

17. Plaintiff is the copyright owner of a feature-length motion picture entitled *Twiharder*, Copyright Office Reg. No. PAu 3-635-415 [Ex. B (BTL_000056)], which is a comedic spoof and parody⁶ of Defendants’ motion pictures *Twilight* (2008) and *The Twilight Saga: New Moon* (2009) and a sociopolitical commentary on *The Twilight Saga* motion pictures.

18. Plaintiff’s film *Twiharder*, which features Gearries and Sean in lead acting roles based on their own original copyrighted screenplay, Copyright Office Reg. No. TXu 1-700-221 [Ex. B (BTL_00049)], also serves to parody the highly enthusiastic fan base and “pop culture phenomenon” surrounding *The Twilight Saga* tentpole franchise.

19. Plaintiff is a for-profit business enterprise and the individual members, Gearries and Sean, earn their living in pursuit of careers in the television and film industry.

⁶ Plaintiff’s feature-length motion picture *Twiharder* is predominantly a parody but it also utilizes other classical rhetorical devices similar to parody such as travesty, pastiche, caricature, satire, farce, comedy of morals, and burlesque.

Notwithstanding the for-profit status of its independent production company, beginning in June 2011 (a full-year before sustaining injury as a result of Defendants’ sham cease-and-desist campaign), Plaintiff publically pledged that 50% of its production donations received on its website www.Twiharder.com (in connection with the prospective second installment *Twiharder, Way Harder*) would be contributed to a charitable organization known as L.E.T.s (“Let’s Erase The Stigma”), a non-profit, public-benefit organization dedicated to erasing the stigma of mental illness. www.lets.org. [Ex. C (BTL_000088); Ex. F (BTL_000354)]

B. DEFENDANTS

(1) LIONSGATE ENTERTAINMENT CORPORATION

20. Defendant LIONSGATE ENTERTAINMENT CORPORATION (“LIONSGATE”) is a North American company formed as “Lions Gate Films” in Vancouver, British Columbia on July 3, 1997. [Ex. E (BTL_000240)]

21. LIONSGATE is an entertainment company with a presence in motion picture production and distribution, television programming and syndication, home entertainment, family entertainment, digital distribution, new channel platforms and international distribution and sales. [Ex. E (BTL_000233)]

22. LIONSGATE is currently a publicly traded company on the New York Stock Exchange [LGF: NYSE; Cyclical Consumer Goods & Services / Entertainment Production] [Ex. E (BTL_000233)]

23. LIONSGATE announced on January 13, 2012 that it had acquired and merged with co-Defendant SUMMIT ENTERTAINMENT, LLC. [Ex. E (BTL_000244)]

(2) SUMMIT ENTERTAINMENT, LLC

24. Defendant SUMMIT ENTERTAINMENT, LLC (“SUMMIT”) is (or was) a

limited liability company organized under the laws of the State of Delaware. [Ex. E (BTL_000260)]

25. To the extent SUMMIT remains operational as a going business concern, Defendant SUMMIT engages in the development, financing, production, and distribution of theatrical motion pictures for consumers in the United States and throughout extraterritorial jurisdictions. [Ex. K (BTL_000508-509)]

26. Before being merged and fully integrated into LIONSGATE's business operations, SUMMIT handled various aspects of marketing and distribution of its own internally developed motion pictures and acquired motion pictures. [Ex. E (BTL_000279)]

27. Originally founded in 1991, SUMMIT became a "fully independent film studio" in or about April 2007 under the direction of Rob Friedman, a former executive at Paramount Pictures who had garnered over three decades of experience working in the motion picture industry [Ex. E (BTL_000263)].

28. Mr. Friedman's transition from Paramount to SUMMIT was bolstered by a \$1 billion cash infusion from a group of investors, including Merrill Lynch, who sought to get involved in "the [motion picture] distribution game." [Ex. E (BTL_000253; BTL_000295)]

29. According to the NEW YORK TIMES, beginning in November 2008, Defendant SUMMIT "came into its own [in the movie industry] with the run-away success" of *The Twilight Saga* motion pictures that are the subject of this action. [Ex. E (BTL_000254)]

(3) DEFENDANTS' COMMON ENTERPRISE

30. The two Defendants named herein, LIONSGATE and SUMMIT, are operating under the laws of the United States as an identical business concern, albeit under different names and technical corporate form, by virtue of the intimate integration, legal merger and business consolidation of their business affairs, such that SUMMIT is merely acting (if at all) as

the selling agency, instrumentality or adjunct of LIONSGATE.

31. By utilizing SUMMIT as a mere agency, adjunct, or instrumentality of LIONSGATE's motion picture business, LIONSGATE must be held jointly and severally liable for the acts and/or omissions of SUMMIT as if LIONSGATE had been doing business vis-à-vis Plaintiff in its very own tradename.

32. As of April 2007, when SUMMIT received its \$1 billion investment as well as a new team of veteran studio executives, SUMMIT had not been equipped to handle its own movie production in-house. The firm was predominantly dedicated to the distribution field of the motion picture industry. [Ex. E (BTL_000283)]

33. In September 2008, merger talks between SUMMIT and LIONSGATE were the subject of mass media speculation, but no official merger deal was finalized at that time. [Ex. E (BTL_000265-66)]

34. On February 1, 2009, it was announced that LIONSGATE would acquire SUMMIT, along with its library of six films and rights to *The Twilight Saga* tentpole franchise. According to one executive familiar with the conversations, merger talks began between the two companies before the initial release of the first *Twilight* installment in November 2008. ***“[Merger] talks progressed far enough that LIONSGATE executives were reading SUMMIT’s scripts, watching their trailers and evaluating marketing materials for upcoming films.”*** [Ex. E (BTL_000265-66; BTL_000288-90)] (emphasis added).

35. Based on information available in the public record, it is plausible that LIONSGATE played a supervisory or instrumental role in the success of *The Twilight Saga* franchise from its inception in November 2008, even though there was no formal merger between SUMMIT and LIONSGATE until January 2012.

36. The merger plans between SUMMIT and LIONSGATE were reportedly put on

hold from September 2008-December 2011 primarily because of LIONSGATE's high-profile legal battle with Carl Icahn, a former shareholder who seemed poised to attempt a hostile takeover of LIONSGATE. [Ex. E (BTL_000292)]

37. On January 13, 2012, the DESERET NEWS reported that LIONSGATE had merged with SUMMIT in a deal which “*brings together two studios* hoping to create a Hollywood powerhouse focused on young adult audiences *Combined*, the studios hope to reap the benefits of *selling to similar audiences*.” [Ex. E (BTL_000298)]

38. In a statement to the press concerning the merger, SUMMIT's former co-chairmen Rob Friedman and Patrick Wachsberger said: “We believe that the *combined media entity* will be even greater than the sum of its parts.” [Ex. E (BTL_000299)] (emphasis added)

39. According to the DESERET NEWS, LIONSGATE's Chief Executive Officer Jon Feltheimer “said Lions Gate would look to consolidate and pare down the *combined studios*' upcoming slate of movies.” [Ex. E (BTL_000299)] (emphasis added)

40. On January 14, 2012, LOS ANGELES TIMES reported that LIONSGATE had merged with SUMMIT in a deal that “will *combine* the largest independent movie studios,” and reported that the studios would “*join forces*” and merge into “*one powerful entity*.” [Ex. E (BTL_000256-57)] (emphasis added)

41. To maintain secrecy, the merger between LIONSGATE and SUMMIT was effectuated via a “rare” type of merger transaction known as a “simultaneous sign-and-close merger agreement” in which about 80 percent of the \$412.5 million purchase price was funded by cash and about 20 percent by stock in escrow. [Ex. E (BTL_000292)]

42. By agreeing to be acquired by LIONSGATE, the owners of SUMMIT acquired “a stake of more than 5% in the *combined* company.” [Ex. E (BTL_000257)] (emphasis added)

43. Defendant SUMMIT now subsists – if at all – as a “separate movie label under

LIONSGATE” as a result of the January 2012 merger. [Ex. E (BTL_000257)]

44. The two nominal Defendants maintain principal executive offices “located around the block from the other” in Santa Monica, California. [Ex. E (BTL_000257)]

45. LIONSGATE was actually represented by the agents of its subsidiary SUMMIT during the course of its wrongful conduct vis-à-vis Plaintiff, including but not limited to the acts and written statements of SUMMIT’s lead intellectual property enforcement counsel, Jill M. Pietrini, Esq. of SHEPHARD MULLIN RICHTER & HAMPTON LLP (“Defendants’ IP Counsel”) [Ex. A (BTL_000007; BTL_000023; BTL_000029; BTL_000035; BTL_000043)]

46. LIONSGATE played a decision-making role in, and at all times had direct knowledge of, the predatory conduct that caused Plaintiff’s antitrust and economic injuries, evidenced in part by the fact that LIONSGATE’s Deputy General Counsel, David C. Friedman, Esq. and LIONSGATE’s Vice-President of Legal Affairs, Robert Mason, Esq., were both copied on *all* communications from Defendants’ IP Counsel to Plaintiff concerning the factual and legal issues at bar. [Ex. A (BTL_000007; BTL_000023; BTL_000029; BTL_000035; BTL_000043; Ex. E (BTL_000276)]

47. A common identity exists between the executive officers and key personnel of LIONSGATE and SUMMIT. For example, Rob Friedman and Patrick Wachsberger, who were the Co-Chairmen of SUMMIT since April 2007, became the Co-Chairman of LIONSGATE’s Motion Picture Group in January 2012. [Ex. E. (BTL_000314)]. Likewise, David C. Friedman, who was the general counsel of SUMMIT became the deputy general counsel of LIONSGATE after the January 2012 acquisition. [Ex. E. (BTL_000292)]

48. On April 30, 2013, LIONSGATE’s Chief Executive Officer, Jon Feltheimer, stated that “*our integration of Lionsgate and Summit is substantially complete*, and we have proven executives like Rob Friedman, Patrick Wachsberger and Erik Feig, all originally from

Summit, leading our film business.” [Ex. E (BTL_000307)] (emphasis added)

49. LIONSGATE’s website features a biographical profile of Wayne Levin, the General Counsel and Chief Strategic Officer, which states that Attorney Levin “has played a key role in Lionsgate’s growth strategy, negotiating and overseeing the acquisitions and *subsequent integration of such companies as Summit Entertainment* (2012).” [Ex. E (BTL_000319)] (emphasis added)

50. Although SUMMIT is registered as the nominal owner of the copyright and trademark interests that are at issue in the case at bar, LIONSGATE is the whole owner of *all* intellectual property rights at issue in this litigation by virtue of the January 2012 merger. Thus, any and all of the purported ownership rights that SUMMIT claims to be enforcing (or defending) under the COPYRIGHT ACT OF 1976 or under the LANHAM (TRADEMARK) ACT OF 1946 vis-à-vis Plaintiff should be properly treated by the Honorable Court as proprietary and pecuniary interests wholly-owned and controlled by LIONSGATE and its shareholders.

51. At relevant times, SUMMIT was and is a wholly-integrated *department*, division or label within LIONSGATE’s motion picture operations and agents of SUMMIT acted under the control and dominion of LIONSGATE.

52. There exists a substantial and continuing connection between LIONSGATE and SUMMIT with respect to on-going anticompetitive conduct and systemic abuse of the federal copyright and trademark laws.

53. Based on the well-pled allegations set forth in this Complaint, it is just and proper for the Honorable Court to treat the two entities named as Defendants herein as one common enterprise, such that both LIONSGATE and SUMMIT may be held liable for the acts

or omissions of each other vis-à-vis their unlawful conduct causing injury to Plaintiff.⁷

[NEXT PAGE]

⁷ See Chicago M. & St. P. R. Co. v. Minneapolis Civic & Comm. Assn., 247 U. S. 490, 62 L. Ed. 1229, 38 Sup. Ct. Rep. 553 (1918).

MOVIE INDUSTRY OVERVIEW

A. LEGAL PROTECTION

(1) “MOTION PICTURES”

54. Plaintiff herein identifies the overall area of effective competition in which both Plaintiff and Defendants operate as the Worldwide Motion Picture Industry (the “WMPI”).

55. The term “motion picture” as used herein is consistent with the definition provided in the Copyright Act of 1976, 17 U.S.C § 101, which provides: “‘Motion pictures’ are audiovisual works consisting of a series of related images, which when shown in succession, impart an impression of motion, together with accompanying sounds, if any.”

56. As explained by the Second Circuit, Congress intended the term “motion picture” to refer to the actual audio-visual *content* of the work itself, rather than to any specific type of medium or conduit used for delivering such content to an audience (e.g., celluloid film, tape, discs, computer files).⁸

(2) “FEATURE-LENGTH FILMS”

57. The WMPI produces and distributes to market what are commonly (and interchangeably) known as “features,” “feature-length” or “feature film” motion pictures.

58. “Feature-length” is an industry term referring to the length of a motion picture. According to the rules of the Academy of Motion Picture Arts and Sciences (“AMPAS”), a feature-length motion picture must have a running time of more than forty (40) minutes to be eligible for an Academy Award.

⁸ Bourne vs. Walt Disney Co., 68 F. 3d 621, 631 (2d Cir. 1995) (“Rather than referring simply to the celluloid film medium, we believe that the term ‘motion picture’ reasonably can be understood to refer to a broad genus whose fundamental characteristic is a series of related images that impart an impression of motion when shown in succession, including any sounds integrally conjoined with the images. Under this concept the physical form in which the motion picture is fixed, film, tape, discs, and so forth is irrelevant...”) (citing 54 S.Rep. No. 72, 92d Cong., 1st Sess. 5 (1971), U.S.CODE CONG. & ADMIN. NEWS 1971 at 1566 (providing Congress’ understanding of “motion pictures” under the Copyright Act of 1909).

59. According to the Screen Actors Guild (“SAG”), a motion picture must be 80 minutes long to be considered “feature-length.”

60. Plaintiff’s copyrighted motion picture at issue in this litigation, entitled *Twiharder*, constitutes a “motion picture” pursuant to 17 U.S.C. § 101.

61. *Twiharder* exceeds 80 minutes in running length and therefore qualifies as a “feature-length film,” “feature film” or “feature” consistent with the published definitions of such terms as set forth by AMPAS and SAG.

62. Defendants’ copyrighted motion pictures at issue in this litigation, entitled *Twilight* (2008), *Twilight Saga: New Moon* (2009), *The Twilight Saga: Eclipse* (2010); *The Twilight Saga: Breaking Dawn* (2011); *The Twilight Saga: Breaking Dawn Part. 2* (2012), and *Breaking Wind* (2012) constitute “motion pictures” pursuant to 17 U.S.C. § 101. Similarly, Defendants’ authorized “motion picture version,” entitled *Vampire Sucks* (2010), constitutes a “motion picture” under the COPYRIGHT ACT.

63. Defendants’ copyrighted motion pictures and authorized motion picture version, as identified in the preceding paragraph of this Complaint, each exceed eighty (80) minutes in continuous running length and therefore qualify as “feature-length films,” “feature films” or “features” consistent with the definitions published by AMPAS and SAG.

(3) FIRST AMENDMENT PROTECTION

64. The U.S. Supreme Court has noted that motion pictures are a particularly valuable form of free speech because they “may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.”⁹

⁹ Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501, 72 S.Ct. 777, 780 96 L.Ed. 1098 (1952).

65. Accordingly, the U.S. Supreme Court recognizes that “expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.”¹⁰

66. As noted by this District Court, “[s]ince ... motion pictures . . . are protected forms of expression, ... any restriction upon their dissemination must be carefully tailored in order to ensure full protection of First Amendment rights.”¹¹

(4) SCOPE OF U.S. COPYRIGHT ACT

67. Consistent with the purpose of U.S. copyright law to grant valuable, enforceable rights to creators of original works of authorship,¹² filmmakers are entitled to register copyrights of their entire motion pictures and underlying screenplays with the U.S. Copyright office.

68. Copyright law affords protection to the actual motion picture *content* registered with the Library of Congress, i.e., the “series of related images that impart an impression of motion when shown in succession, including any sounds integrally conjoined with the images.”¹³

69. A copyrighted motion picture is neither a good, nor a service, but it is an author’s expression of speech content that has been transfixed into a tangible format or delivery device (e.g., film, DVD, Blu-Ray, Quicktime file, MPEG).

70. U.S. Copyright law does NOT protect the subject matter, ideas, concepts, non-sequential plotlines and/or or themes expressed by the filmmaker in his copyrighted motion

¹⁰ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502, 72 S.Ct. 777, 781, 96 L.Ed. 1098 (1952).

¹¹ *St. Martin’s Press, Inc. v. Carey*, 440 F.Supp. 1196, 1204 (S.D.N.Y. 1977).

¹² *Diamond v. Am-Law Pub. Corp.*, 745 F.2d 142, 147 (2d Cir.1984) (stating that the principal purpose of the Copyright Act of 1976 is to encourage the origination of creative works by attaching enforceable property rights to them).

¹³ *Bourne vs. Walt Disney Co.*, 68 F. 3d 621, 631 (2d Cir. 1995).

picture.

71. U.S. Copyright law does NOT protect the title of a “single-work” motion picture.

72. U.S. Copyright law does NOT protect a title based on a *series* of motion pictures.

73. U.S. Copyright law does NOT protect the filmmaker’s “moral rights,” “sense of dignity”, “personal pride” or sociopolitical view of the world as expressed in a copyrighted motion picture work.

(5) SCOPE OF U.S. TRADEMARK ACT

74. U.S. trademark law, as codified in the LANHAM (TRADEMARK) ACT OF 1946, 15 U.S.C. § 1051, et seq. (the “TRADEMARK ACT”) can only protect specific words, phrases, logos or symbols used to *promote* or advertise a copyrighted motion picture in commerce.

75. In the context of the Worldwide Motion Picture Industry, a trademark holder may be accorded the right to enjoin a competitor from using confusingly similar trade dress (i.e., DVD Cover, Movie Poster, Image artwork) that fails to properly identify the source of the motion picture embodied in the DVD.

76. A copyrighted motion picture, as an expression of free speech content, may not be trademarked nor service marked.

77. The TRADEMARK ACT does NOT extend protection to the speech content, cinematographic material or literary screenplay embodied in a copyrighted motion picture.

78. U.S. Trademark law does NOT protect a motion picture title of a “single-work” motion picture (e.g., *Titanic*, *Independence Day*, *Raiders of the Lost Ark*, etc.)¹⁴

79. U.S. Trademark law may provide limited protection to the title of a *series* of motion picture (e.g., *Harry Potter*, *Indiana Jones*, *Star Wars*), provided that the series title helps

¹⁴ TMEP §§ 1202.08; 1202.08(a).

consumers identify the source of the movie series.¹⁵

80. Under the TRADEMARK ACT, only those marks associated with goods and services actually used in commerce by the rights holder to help consumers properly identify the source of such goods and services can be subject to federal registration.

B. INDUSTRY COMPONENTS

(1) OVERVIEW

81. The WMPI consists of several major creative, technological and commercial fields including, but not limited to:

- (a) artistic development (e.g., concept development, screenwriting);
- (b) financing (e.g., procurement of investment equity or debt);
- (c) film production (e.g., casting, directing, cinematography, post-production);
- (d) marketing (e.g., movie trailers, commercial advertisements and promotional spots); and
- (e) distribution (e.g., dissemination of the movie through theatrical box office release, home packaged media, VOD, EST and broadcast rights).

82. For purposes of Plaintiff's claims in this matter, the focus of Defendants' unlawful activity is within the WMPI fields of marketing and distribution of "feature-length" (or "feature film" motion pictures.

(2) WMPI DISTRIBUTION

83. Distribution, as that term is ordinarily used in the WMPI ("WMPI Distribution"), is the conduit or delivery system through which the rights holder of a motion picture disseminates content to an intended audience. Distribution also represents the chief *source* of

¹⁵ TMEP § 1202.08; 1202.08(b); 1202.08(c); 1202.08(d).

revenues earned in the WMPI.

84. Distribution is to movies what publishing is to books. Without distribution of a motion picture to audiences, existence of such motion picture is a mere technicality, not unlike the “sound” a tree makes when it falls in the forest outside the capacity of anyone to hear it.

85. The “channels” of WMPI Distribution include theatrical release (i.e., box office); packaged home video (i.e., DVD, Blu-Ray); cable video-on-demand (“VOD”); satellite pay-per-view (PPV), electronic sell through (“EST”) and variations thereof (e.g., hotel PPV, internet on demand (“IVOD”), airline PPV, cruise ship / maritime PPV, military base etc.)

86. WMPI Distribution is essential to the commercial exploitation of a copyrighted motion picture and underlying screenplay.

(3) WMPI MARKETING

87. Marketing, as that term is ordinary used in the WMPI (“WMPI Marketing”), consists of the promotion and advertising used by the filmmaker or movie studio to create awareness and excitement in the consumer market concerning the distribution of a motion picture. A favorable WMPI Marketing campaign generates what is referred to as “buzz.”

88. WMPI Marketing is carefully timed and coordinated with the distribution of a motion picture so as to maximize consumer awareness concerning the exhibition of a copyrighted motion picture.

89. WMPI Marketing materials generated by the rights holder may consist of movie posters, movie trailers, television spots (15/30 seconds), newspaper ads, press releases, televised interviews with actors featured in the motion picture, social media networking.

90. The “trade dress” of a particular advertisement or other printed visual image used in connection with the marketing and promotion of a motion picture, including the cover art utilized on a DVD package that contains a disc embodying the copyrighted motion picture,

generally implicates protection under Trademark law.

91. In the WMPI, the terms “marketing” and “distribution” are not necessarily interchangeable. The marketing component of the industry depends entirely upon whether WMPI Distribution is available, such that if a motion picture is excluded from the system of WMPI Distribution, then there is no logic to marketing such motion picture because it will not be available for exhibition through applicable distribution channels.

92. Conversely, a motion picture may achieve WMPI Distribution even in the absence of any marketing campaign, or with otherwise limited promotional support, because the availability of the motion picture through one or more of the WMPI Distribution channels is itself a form of marketing for the underlying content.

C. BUSINESS MODELS

(1) “BLOCKBUSTER-SEQUEL” PARADIGM (1975-2000)

93. The word “blockbuster” dates back to World War II when it was used in reference to bombs which could level entire blocks or streets. [Ex. W (BTL_001337)]

94. With the theatrical release of Steven Spielberg’s *Jaws* in 1975, the word was used to usher in a new age of cinema known as the “blockbuster film.” The success of *Jaws*, the first film released in America to be described as an “event,” was accompanied by the sale of merchandise such as soundtracks, stuffed sharks, beach towels, T-shirts, caps and action figures. The sale of goods not only helped to promote the film but it also created an ancillary source of revenue for the movie industry. [Ex. W (BTL_001336-39)]

95. After George Lucas’ *Star Wars* was released in 1977, creating a pop culture phenomenon, movie studios realized that merchandising for a blockbuster film could generate more money than what the film earned at the box office. With the release of *Empire Strikes*

Back in 1980, which was the “sequel” to *Star Wars*, the concept of the “movie franchise” or “movie brand” based on blockbuster films was born. [Ex. W (BTL_001336-39)]

96. Although “movie franchises” based on blockbuster films and their sequels have existed for decades in the WMPI (e.g., *Jaws*, *Star Wars*, *Indiana Jones*, *Ghostbusters*, *Jurassic Park*, *Rocky*), such “brands” were often created by chance, i.e., in natural response to staggering box office results that had rarely been anticipated. Sequels to such blockbusters were rarely (if ever) planned or financed by movie studios before the theatrical debut of the first film.

97. The merchandising aspects of the blockbuster films during this era were a key source of revenue for studios but viewed as collateral to and driven by the organic success of the motion picture.

98. Moreover, while some blockbuster films of this era were based on a popular literary work (e.g., *Jaws*, *Jurassic Park*), most of the highest grossing blockbusters of the 1970s, 1980s and 1990s were based on nothing more than an original screenplay and a director’s unique cinematic vision (e.g., *Star Wars*, *Raiders of the Lost Ark*, *E.T. the Extra-Terrestrial*, *Back to the Future*, *Titantic*, *Independence Day*, *Lion King*).

(2) “TENTPOLE” FRANCHISE (2001-PRESENT)

99. Beginning with the *Lord of the Rings: Fellowship of the Ring* (2001) and *Harry Potter and the Philosopher’s Stone* (2001), Hollywood discovered that movie franchises based on a *series* of popular books - rather than one novel or random screenplay – could produce revenues that far exceeded the traditional blockbuster movie, the success of which often depended more on unforeseen market forces than on carefully orchestrated studio planning.

100. In the global marketplace of the new digital millennium, the unpredictable nature

of the “blockbuster-sequel” paradigm gave way to a new type of WMPI business model for maximizing profit known as the “tentpole franchise.”¹⁶

101. The tentpole franchise model involves creating a recognizable brand in the public consciousness beginning with the marketing of a popular book series - invariably based on tales of young adult fantasy - which is then spun off into a planned *series* of copyrighted motion pictures. Success at the box office makes the brand instantly “famous” and the new brand can then be used as a platform to launch the sale of other wares to consumers.

102. Under the tentpole franchise model, the motion picture itself is often a marketing vehicle or commercial spot used to advertise the preconceived brand as a whole. In some cases, sequels and prequels are financed and filmed even before the debut of the initial installment.

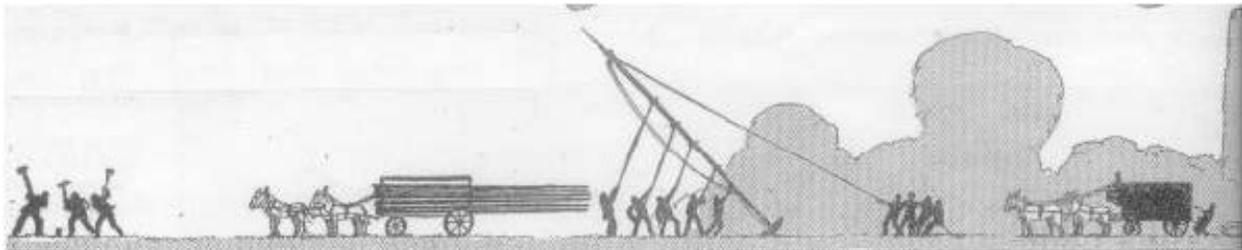
103. According to Time Warner CEO Jeff Bewkes, tentpole franchises are big-budget extravaganzas that have proven to be financially beneficial for the major movie studios. Despite the high cost of upfront investment, Bewkes believes that franchise properties are “more predictable” and “are more profitable and less risky than medium or small” budget films.” He recently stated that “[i]n the old days the sequels [to blockbuster films] were weaker” and less interesting than the original productions. With respect to *Harry Potter*, “we made eight of them. They were all successful...but they were not the same.” Bewkes also saluted Disney’s handling of *Iron Man*, following the recent box office success of *Iron Man 3* in May 2013. That “shows you how you can build a franchise if you’re good at it, and all of the

¹⁶ **tent pole** *n.* something, such as a commercial undertaking, a story franchise, or a fictional character, that serves as primary support (for a company, television program, etc.), especially a blockbuster movie which compensates for a studio’s flops. (source: Double-Tongued Dictionary) http://www.waywordradio.org/tent_pole/; “The term **tent-pole** refers to a broadcast programming or motion picture expected to *hold up* (as is the function of a tent pole) and balance out the financial performance of a movie studio or television network. In the movie business, *tent-poles* are sometimes widely-released initial offerings in a string of releases and are expected by studios to turn a profit in a short period of time. Such programming is often accompanied by larger budgets and heavy promotion [http://en.wikipedia.org/wiki/Tent-pole_\(entertainment\)](http://en.wikipedia.org/wiki/Tent-pole_(entertainment))

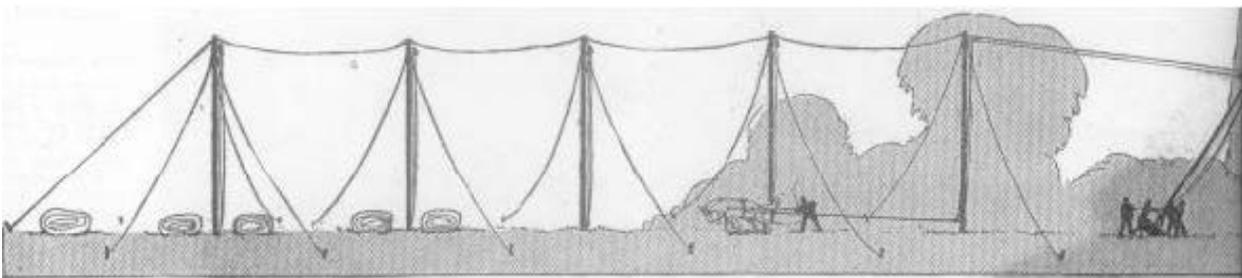
studios are getting good at it.” [Ex. W (BTL_001334)]

104. Use of the word “tentpole” as a metaphor for doing business in the new millennium movie industry is particularly fitting because it carries historical significance that relates back to one of the first forms of American popular entertainment: the “Big Top” circus.

105. From an engineering standpoint, a “tentpole” is the center pole of a “Big Top” circus tent which is the first structure erected by technicians in order to secure the foundation of the Big Top. While the center pole, also known as the “king pole” is hoisted into place by sixty-plus men, stakes are driven into the ground at positions adjacent thereto and all of the other poles are swiftly raised into place via horsepower using the center king pole as a *lever*. Each of the adjacent poles are propped up by and subject to the forces of the king pole, all of which are then systematically bound together under one massive canvass.¹⁷ [Ex. W (BTL_001342-44)]



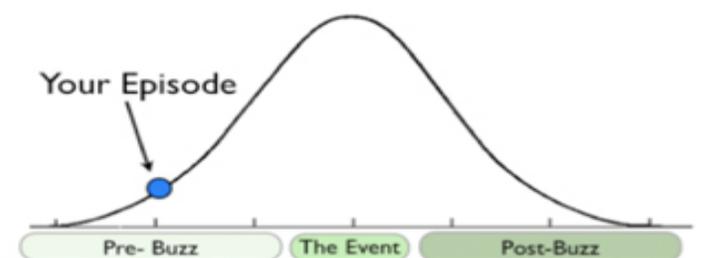
Driving stakes and setting up the center pole of the tent



Center pole in place, remaining poles are hoisted into place.

¹⁷ <http://www.circushistory.org/History/Tent.htm> (citing an article from the SAN FRANCISCO EXAMINER, dated June 15, 1919, describing how tentpoles are hoisted as the first step to erecting a 130,000 square foot Ringling Bros. Barnum & Bailey “Big Top” circus tent) (including illustrations)

106. From a cultural standpoint, the traveling circus of the 19th century is built around one gigantic event (i.e., a “tentpole event”) that is characterized by great anticipation and a public sense of wonderment. Like holidays, tentpole events bring people together for a common purpose and become the socio-cultural events around which other human activities tend to orbit. Capturing the public imagination is paramount to the success of the entertainment purveyor because he is selling a “magical experience” that centers around the market “buzz,” or favorable impressions conveyed to American audiences.



107. From an organizational standpoint, a tentpole event demands careful orchestration of all moving parts *well in advance*. As recently noted by LIONSGATE’s CEO, Mr. Jon Feltheimer:

We’ve been focused on building strong brands and franchises from our inception ...repeatable brands that can be marketed cost effectively.

If you cultivate your brands carefully, sooner or later some of them will break out on a worldwide level. I like what one of our analysts said—*we’re an overnight sensation that was 12 years in the making* ...

We continue to take a *portfolio approach to our feature film business*. *Our slate is driven by a combination of tentpole franchises, strong brands with worldwide commercial potential* and critically exciting, daring films.

Although *The Hunger Games* and *The Twilight Saga: Breaking Dawn—Part 2* drove our worldwide box office of more than \$2.5 billion last year, a total of eight films contributed to our success with more than \$40 million apiece at the domestic box. [Ex. E (BTL_000306)] (emphasis added)

108. From a timing standpoint, a tentpole “franchise,” which is built around a cultural event or series of mini-events, is distinguishable from a fast food or service industry franchise which increases revenue streams over the course of decades by building brand loyalty around a fixed foundation of consistent quality and assurance (regardless of the calendar date). Installation of a “Big Top” tentpole, in contrast, is designed to be *ephemeral* because the circus is constantly traveling to new geographic areas, and the operator only has a *limited period of time* in which to monetize the goods and services being sold to the local community.

109. In the same way, the tentpole franchise of the modern WMPI is characterized by the studio’s objective to generate maximize profits from a single, ephemeral brand in a very short period of time. Not unlike the circus coming to town, a tentpole franchise built around a single movie brand such as *The Twilight Saga* is here today and gone tomorrow.

MOTION PICTURE FEATURES

A. THE TWILIGHT SAGA

(1) FEATURE RELEASES

110. On November 21, 2008, Defendants released the first installment of the *The Twilight Saga* movies entitled “*Twilight*,” a teen fantasy romance about vampires who attend U.S. high school based on the best-selling book of the same name by Stephenie Meyer. [Ex. E (BTL_000264)] As of the time of the film’s debut, Meyer’s four-book vampire romance series had already sold 16 million copies and had been translated into 36 languages. [Ex. O (BTL_000745)]. At the theatrical box office, the *Twilight* film earned a total of \$192.8 million domestically and \$392.6 million worldwide. [Ex. H (BTL_000369-370)] In packaged home media sales (e.g., DVD), *Twilight* has reportedly earned \$203.7 million in sales.

111. On November 20, 2009, Defendants released the second installment entitled *The Twilight Saga: New Moon*, also based on the popular novel by Stephenie Meyer, breaking box office records in its first weekend, grossing \$142,839,137 in three days and posting the fourth all-time best weekend box office figure. [Ex. E (BTL_000264)] At the theatrical box office, *The Twilight Saga: New Moon* film earned a total of \$296.6 million domestically and \$709.8 million worldwide. [Ex. H (BTL_000369-370)] In packaged home media sales (e.g., DVD), *The Twilight Saga: New Moon* has reportedly earned \$187 million in sales.

112. On June 30, 2010, Defendants released the third installment of the *Twilight* series entitled *The Twilight Saga: Eclipse*. It broke a midnight screening record of over \$30 million and set a one-day Wednesday record of \$68.5 million but failed to surpass the one day tally of \$72 million set by *New Moon*. It became the first movie in the series to cross the \$300 million mark domestically. [Ex. E (BTL_000264)] At the theatrical box office, *The Twilight Saga: Eclipse* film earned a total of \$300.5 million domestically and \$698.5 million worldwide. [Ex.

H (BTL_000369-370)] In packaged home media sales (e.g., DVD), *The Twilight Saga: Eclipse* has reportedly earned \$167.5 million in sales.

113. On November 18, 2011, Defendants released the fourth installment of the *Twilight* series entitled *The Twilight Saga: Breaking Dawn Part 1*, which earned a total of \$281.3 million domestically and \$712.2 million worldwide. [Ex. H (BTL_000369-370)] In packaged home media sales (e.g., DVD), *The Twilight Saga: Breaking Dawn – Part 1* has reportedly earned \$99.4 million in sales.

114. On November 16, 2012, Defendants released the fifth and purportedly final installment of the *Twilight* series entitled *The Twilight Saga: Breaking Dawn Part Two*, which earned a total of \$292.3 million domestically and \$829.7 million worldwide. [Ex. H (BTL_000369-370)]

115. In the aggregate, the five *The Twilight Saga* films grossed a total of \$3.34 billion at the worldwide box-office in theatrical release. [Ex. H (BTL_000369-370)]

(2) “TWIHARD” FANS

116. With the breakout box-office success of the first *The Twilight Saga* movie in November 2008, a popular culture phenomenon manifested visibly through the intense passion and dedication of the franchise’s largely teenage female fan base.

117. The most enthusiastic fans of *The Twilight Saga* series became known through the popular media as “Twihards,” which is an invented composite word used to describe “diehard fans of ‘Twilight’” [Ex. O (BTL_000757)].

118. Twihards have been described by the press as “Vampire groupies” [Ex. O (BTL_000737)] and “ardent fans” who turn out “en masse for midnight screenings of *Twilight*” and have “a passion for Stephenie Meyer’s supernatural book.” [Ex. O (BTL_000740-741)]. Twihards are said to be “overwhelmingly female” [Ex. O (BTL_000762)] and to “include

young adults and mothers of teens captivated by the supernatural romance.” [Ex. O (BTL_000750)]. “Twihards will spend the winter nitpicking over details in their new fave movie. The test of any cult hit is whether it can pull in viewers beyond hard-core fans.” [Ex. O (BTL_000754)].

119. According to Robert Thompson, professor of pop culture at Syracuse University, the popular culture phenomenon surrounding *The Twilight Saga* rivals the *Star Wars* phenomenon and *Beatlemania*:

“The similarities are that these aren’t just movies, they’re lifestyle kind of things . . . It’s the books, it’s the movies, it’s the universe, it’s the gatherings, it’s the talk on the Internet, it’s the action figures . . . probably one of the great appeals for the people camped outside that theater is that they are physically present with each other.” [Ex O. (BTL_000763)]

120. According to the Urban Dictionary the definition of “Twihard” is: “Stupid obsessive people (mostly teenage girls) who are in love with fictional characters and wouldn't know a good book if it punched them in the face.” [Ex. O (BTL_000774)]¹⁸

121. Stephenie Meyer, author of *The Twilight Saga* books, disapproves of the official moniker of her fan base: “I don’t really like ‘Twi-Hard.’ It sounds awful.” [Ex. O (BTL_000774)]

122. In defending the obsessive-like behavior exhibited by young females in response to *The Twilight Saga*, one Twihard has been quoted as saying: “[W]omen are allowed to be just as dorky and just as devoted to the franchises that they love as fanboys are to theirs.” [Ex O. (BTL_000764)]

123. Twihards are also said to attend traveling “Twilight Conventions,” sponsored by the Defendants, which are organized gatherings consisting of the most dedicated Twihards.

124. The utility of such conventions parallels the oft-parodied “*Star Trek*

¹⁸ See <http://www.urbandictionary.com/define.php?term=Twihard>

conventions,” which attract their own brand of hardcore fans known as “Trekkies,” a term used to describe devoted fans of the 1960s science fiction TV series *Star Trek*. Gene Roddenberry, the creator of *Star Trek*, famously commented that “those [*Star Trek*] conventions scare the hell out of me. It is scary to be surrounded by a thousand people asking questions as if the events in the series actually happened.”

125. Similar to Trekkies, and consistent with Rodenberry’s observation, Twihards have come to be viewed as that class of entertainment consumer who have gone beyond the momentary suspension of disbelief required to enjoy a 90-minute fantasy picture and have developed a fanatical obsession with fictional concepts at the expense of true reality.

(3) CRITICAL REACTION

126. At the height of its popularity, *The Twilight Saga* movie franchise was one of those ubiquitous popular culture events that tended to strongly polarize public opinion, such that audiences were said to absolutely love *The Twilight Saga* or unconditionally “hate” it.

127. For those who took offense to *The Twilight Saga* motion pictures, the adverse commentary was not only directed at the movie itself based on artistic merit (or perceived lack thereof). Critical statements were often directed to Twihards, that overzealous class of fans who somehow viewed the Defendants’ movies as more than just a momentary cinematic escape and who adopted the fantasy world depicted therein as a “way of life” that influenced attitudes, behaviors and perceptions beyond the four walls of the Cineplex.

128. Mainstream movie critics have tended to disfavor *The Twilight Saga* film series, as evidenced by some of the following reviews:

- ◆ “You’re going to hear a lot about *Breaking Dawn 2* being the best of the *Twilight* movies. That’s like saying a simple head cold is preferable to swine flu.” Peter Travers, ROLLING STONE, Nov. 16, 2012
- ◆ *Twilight*: “A deeply sincere, outright goofy vampire romance for the

hot-not-to-trot abstinence set.” Mahohla Dargis, NEW YORK TIMES, April 8, 2011.

♦ “Fans of the series, which has made more than \$2 billion worldwide, will no doubt find it all terribly romantic and deeply meaningful. The rest of humanity will remain unmoved.” Clauid Puig, USA TODAY, Nov. 12, 2012

♦ “What remains is the total conviction that the ludicrous scenes are dead serious and fiercely meaningful. The result is not quite a laugh a minute. But close.” Rafer Guzman, NEWSDAY, Nov. 17, 2011

B. FEATURE FILM PARODIES

129. When a brand, public figure, public official, or movie franchise becomes well known to the masses and/or famous in its own right, it achieves a level of ubiquity that invariably provokes ridicule.

(1) *VAMPIRE SUCKS* (2010)

130. Once a tentpole franchise such as *The Twilight Saga*, and its Twihard fanbase, garnered mainstream recognition and approached cult-hit status, it was only a matter of time before it became subject to being spoofed by other feature motion pictures.

131. On August 18, 2010, about two months after the release of the third *Twilight* installment, third-party distributor 20th Century FOX released a feature-length comedic spoof of *The Twilight Saga* franchise entitled *Vampires Suck*. The film was rated PG-13 and had a reported production budget of \$20 million. On BoxOfficeMojo.com, the film was categorized in the genre of “Comedy-Spoof,” “Horror Comedy” and “Vampire.” The picture earned domestic box-office receipts of \$36.6 million and worldwide box office of \$80.7 million. [Ex. I (BTL_000378)]

132. On November 20, 2010, *Vampire Sucks* was released on packaged media DVD and Blu-Ray disc, including rated and “unrated” versions. [Ex. I (BTL_000381)] The domestic

DVD sales have totaled more than \$10.6 million. [Ex. I (BTL_000385)]

133. In the aggregate, *Vampire Sucks* has earned more than \$91.4 million in theatrical box office and domestic packaged media sales. [Ex. I (BTL_000385)]

134. As invariably noted by the major media outlets upon the film's release, *Vampire Sucks* was marketed and distributed to the public as a commercial feature-length film parody of *The Twilight Saga* films. See, e.g., BOSTON HERALD [Ex. I (BTL_000418)] (“essentially a straightforward mash-up of the first two “Twilight” films”); CHICAGO TRIBUNE [Ex. I (BTL_000421)] (“The parody of the first two *Twilight* movies is the usual mixed bag of hits and misses, but with more hits than expected. For those who can't get enough of photogenic teen vampires and werewolves, consider this another helping, albeit basted in mockery”); LOS ANGELES TIMES [Ex. I (BTL_000423)] (“a lightly regarded spoof of the movies on novelist Stephenie Meyer's blockbuster *Twilight* series”).

135. On August 18, 2010, the WASHINGTON POST reviewed *Vampire Sucks* stating that it involved the same writer-directors:

“that have participated in an ongoing parade of movie-genre parodies, including *Scary Movie*, *Date Movie* and *Meet the Spartans* and [who] have set their comedic crosshairs on the most obvious of targets: the hugely successful film franchise based on the equally successful novels by Stephenie Meyer ... The plot, for lack of a better word, is based on a pastiche of moments from the first two *Twilight* films: *Twilight* and *The Twilight Saga: New Moon*.” [Ex. I (BTL_000398-99)]

136. According to the ST. PETERSBURG TIMES' review of *Vampire Sucks*:

“[t]he crude title is about as subtle as the jokes get in *Vampires Suck*, another scattershot pop culture spoof from hack jesters Jason Friedberg and Aaron Seltzer. But this time they chose a subject worth ridiculing. *Vampires Suck* drains every ounce of pretension from Stephenie Meyer's *Twilight* saga and the ensuing movie franchise, even tossing in a spoiler for the *Breaking Dawn* flick that won't be released until 2011. The only surprise is that Meyer didn't receive a co-writing credit for setting up the punch lines ... It helps that Friedberg and Seltzer stick with one pop culture target this time, unlike earlier spoofs so thinly spread among multiple movies...” [Ex. I (BTL_000403)]

137. Rafer Guzman of *NEWSDAY* described *Vampire Sucks* as “a spoof of the *Twilight* franchise,” and queried “How do you spoof a self-parody?” Guzman noted:

The best satires actually love their victims. Mel Brooks’ *Young Frankenstein* paid tribute to classic horror films. *Airplane!* showed a near-scholarly grasp on disaster movies. Even the merciless *MAD* magazine parodies of the 1970s – “The Ecchorcist” comes to mind - were drawn and written with great admiration for the originals.

Granted, the *Twilight* films are difficult to love. For starters, they feel like soulless marketing ploys (though millions of preteen girls might beg to differ) . . . [with *Vampires Suck*] we’re limited to one film series.” [Ex. I (BTL_000412)]

138. The *HOUSTON CHRONICLE* commented:

For those who have missed this recent string of *Airplane*-without-the-funny spoof movies, the formula is very simple: Writer/ directors Aaron Seltzer and Jason Friedberg take a movie genre that is popular with young people, cast inexpensive actors and then insert a ton of slapstick, gross-out scenes and apropos-of-nothing jokes involving whatever celebrities are trending the highest on Twitter. *Vampire Sucks* manages not a single memorable joke at the expense of the easiest target in the world: Stephenie Meyer fans. [Ex. I (BTL_000412)]

139. *Vampire Sucks* did manage to garner some favorable reviews from the *FRESNO (CA) BEE*, describing the film as:

“a dead-on send-up of the *Twilight* films . . . The parody works because the pair [Friedberg-Seltzer] have created an almost exact replica of the [Twilight] films from setting to actors . . . Friedberg and Seltzer have done a good job of poking fun at *Twilight*, but it’s hard to figure out who’s going to want to see it. Twi-hards who’ve aligned themselves with either Team Edward or Team Jacob might not be amused. Those who’ve written off the series might not want a reminder.” [Ex. I (BTL_000406)]

140. In stark contrast to the largely female audiences who attended *The Twilight Saga* films, the commercial box-office success of *Vampire Sucks* was largely driven by “young boys,” who consisted of over 45% of the demographic audience. According to 20th Century FOX, who described the box-office performance of *Vampire Sucks* as a “great success,” many

of the young boys who attended the film in theaters “would never dared to be seen inside one of the *Twilight* films.” [Ex. I (BTL_000423)]

141. Jason Friedberg and Aaron Seltzer, the writing-directing team behind *Vampire Sucks*, appear to be the only filmmakers in Hollywood over the last seven years who are authorized to make parody films targeted for wide theatrical release. In addition to *Vampire Sucks*, the Friedberg-Seltzer team is responsible for *Date Movie* (2006), *Epic Movie* (2007), *Meet the Spartans* (2008), and *Disaster Movie* (2008).

142. Defendants have authorized Friedberg and Seltzer to write and direct a feature-length parody film of their popular *Hunger Games* franchise called *The Starving Games*, which is scheduled to be released in 2013.

143. Defendants’ pattern of utilizing the same writing and directing team to create feature length parodies of their movie franchises – at the exclusion of independent filmmakers – suggests that Defendants will only authorize parodies of their movie if such films are “safe” formulaic romps targeting a largely juvenile audience.

144. In contrast, parodies such as Plaintiff’s motion picture *Twiharder*, which incorporates elements of “low brow” humor mixed with subtle dark comedy, sophisticated satire and sociopolitical commentary are NOT authorized.

145. *Vampire Sucks* was produced by Regency Enterprises, a long-term production and distribution partner of SUMMIT. Prior to *The Twilight Saga*, the biggest hit SUMMIT ever had at the box office was *Mr. and Mrs. Smith* (2005), featuring Brad Pitt and Angelie Jolie, which was co-produced by Regency Enterprises and SUMMIT. In 2011, SUMMIT acted as the co-distributor and producer for a Regency Enterprises film called *Darkest Hour*.

(2) BREAKING WIND (2012)

146. On January 13, 2012, the same day that LIONSGATE announced its official

merger with SUMMIT and about two months after wide theatrical release of the fourth installment in *The Twilight Saga* series, Defendants released its own feature-length film parody of *The Twilight Saga* movie franchise entitled *Breaking Wind*. [Ex. J. (BTL_000440)]

147. *Breaking Wind* is an R-rated 82-minute spoof of the third installment of the *Twilight* series, *The Twilight Saga: Eclipse*, which minimal references to other films. [Ex. J (BTL_000448-449; 458)]

148. Like *Vampire Sucks*, *Breaking Wind* was marketed and distributed to the public as a commercial feature-length film parody of *The Twilight Saga* films. Movieweb.com described *Breaking Wind* as “a comedic spoof based on the worldwide phenomenon, *The Twilight Saga*.” [Ex. J (BTL_000474)]

149. Defendant LIONSGATE provided the following synopsis of its film *Breaking Wind*:

From the director who brought you *The 41 Year Old Virgin Who Knocked Up Sarah Marshall And Felt Super Bad About It* comes the new wildly funny spoof of the latest films from the TWILIGHT SAGA: NEW MOON and ECLIPSE. Raunchy hilarity ensues when Bella's life becomes threatened by the vengeful Victoria and her gang of blood sucking newborns and Edward and Jacob must put aside their differences. [Ex. J (BTL_000447)]

150. *Breaking Wind* was not theatrically released in U.S. market. However, between January 12, 2012 and March 22, 2012, *Breaking Wind* was theatrically released in foreign markets, including Brazil, Italy, Philippines and Singapore, reportedly earning \$1,408,604 at the foreign box office. [Ex. J (BTL_000481-484)]

151. On March 27, 2012, *Breaking Wind* was released direct to the home video market in the United States by LIONSGATE’s Home Entertainment division. [Ex. J. (BTL_000440; 478)] The movie is available in packaged media format at Walmart.com, which features a widescreen version and an unrated director’s cut. [Ex. J (BTL_000490)]

152. The R-Rating and overt sexual content of *Breaking Wind* ensured that the film would NOT be seen by a vast majority of the pre-teen fanbase for Stephenie Meyer's books.

153. There were no press reviews of the film, however, various users at Amazon.com described *Breaking Wind* as "a dirty spoof of those sparkly glampire movies," "A nice F-U to the makers of Twilight and the over obsessed psycho fans of it all," [Ex. J (BTL_000455)]

C. *TWIHARDER: THE SPOOF*

(1) ORIGIN OF THE *TWIHARDER* CONCEPT

154. In the wake of the record-breaking box office success of the second installment of the series, *The Twilight Saga: New Moon* in November 2009, John Gearries was amused to discover that his girlfriend's young daughter had become one of the legion of obsessed *The Twilight Saga* fans. Gearries was shocked to witness firsthand the near cult-like fanaticism exhibited by his girlfriend's daughter.

155. Gearries, a professional actor in his late twenties, could not comprehend why so many teenagers, particularly females, became enthralled with *The Twilight Saga* movie franchise, which not only failed to capture his imagination, but which he found decidedly unworthy of praise. For Gearries, a lifelong fan of dark comedy and political satire, *The Twilight Saga: New Moon* motion picture was so impossibly bad in terms of its acting, character development, typecasting, dialogue, and over-dramatization that Gearries developed a warped admiration for *The Twilight Saga* based on its sheer mediocrity.

156. Like any classical parodist, Gearries' admiration for *The Twilight Saga* flowed not from any literal belief or suspended disbelief in the fantasy portrayed on-screen. Rather, *The Twilight Saga: New Moon* provided a different sort of inspiration – the kind that compels a comedic artist to deconstruct the narrative, analyze the encoded messages and create therefrom

a highly distorted, warped reflection of the “epic morality play” with the intent to show audiences just how ridiculous it all really was.

157. As a professional actor with a love for comedy-spoofs such as *Scary Movie* and other Wayans Brothers films that “pushed the envelope,” Gearries teamed up with fellow Los Angeles-based actor and screenwriter Christopher Sean to produce several 3-7 minute audio-visual shorts that comically impersonated and mocked *The Twilight Saga* characters and themes espoused in the *The Twilight Saga: New Moon* film. The pair launched the videos on-line. [Ex. D (BTL_000226)]

158. At the time Gearries and Sean published their audio-visual works, the *Twilight* fervor in the mass media was peaking audience response levels and video-sharing sites such as Youtube were populated with various *Twilight* parody shorts and critical commentaries known as “mash-ups.”

159. Despite the crowded internet marketplace, the Gearries / Sean videos proved to be a hit with fans. On the strength of favorable responses from family, friends and the vast on-line community, Gearries and Sean caught further inspiration and began to recognize that *The Twilight Saga* had truly “influenced world-wide culture” and had become a “world-wide market.” [Ex. D. (BTL_000227)]. As their videos gained popularity, they saw themselves as participants in a movement which demanded their hilarious performance. They realized that they could achieve visibility as actors / screenwriters using the parody as a vehicle.

160. Motivated by the positive feedback from the web videos, the comedy duo of Gearries and Sean decided in January 2010 to produce a *feature length* parody of *The Twilight Saga: New Moon*. This decision was made almost eight (8) months before the theatrical release of *Vampire Sucks* in August 2010 and two full years before LIONSGATE’s release of *Breaking Wind* in January 2012.

(2) PRODUCTION OF “TWIHARDER”

161. On February 1, 2010, Christopher Sean, acting on behalf of Plaintiff, e-mailed eleven (11) original audio-visual works, tentatively entitled *TWILIGHT SPOOF: Between the Lines* with the SCREEN ACTORS GUILD (“SAG”). [Ex. Q (BTL_000982)]

162. On February 2, 2010, SAG requested additional information about the TWILIGHT SPOOF project before transmitting a copy of the SCREEN ACTORS GUILD New Media Agreement. [Ex. Q (BTL_000983)]

163. On February 24, 2010, Plaintiff Between the Lines Production LLC filed its Article of Organization with the State of California, Secretary of State [Ex. D. (BTL_000211)]

164. On March 24, 2010, Gearries drafted the Operating Agreement for Between the Lines Productions LLC. [Ex. D (BTL_000212)]

165. On March 29, 2010, Plaintiff obtained its Employer Identification Number from the Internal Revenue Service. [Ex. Q (BTL_001030)]

166. On April 11, 2010, Plaintiff notified SAG that the title of its production would be “*Twiharder*.” [Ex. Q (BTL_000985)]

167. On April 12, 2010, Plaintiff registered the domain name www.Twiharder.com via GoDaddy. [Ex. D (BTL_000297)]

168. On May 1, 2010, Plaintiff received its Tax Registration Certificate from the City of Los Angeles. [Ex. D (BTL_000213)]

169. From April 16, 2010 through May 16, 2010, Plaintiff filmed its original, full length *Twiharder* motion picture on location at various sites throughout the Los Angeles, California area. Actual filming of *Twiharder* was scheduled on thirteen (13) distinct dates over the course of one month where the cast and crew worked anywhere from 8-15 hours per shooting date. [Ex. Q (BTL_000987)]

170. Gearries and Sean executive produced the motion picture *Twiharder* on behalf of Plaintiff and they both co-wrote the script and starred in the movie.

171. The production entailed about 30-40 actors, 80 production/crew staff and approximately ten musicians. Giorgio Caridi directed the film with a cast including Tanya Zoeller (“*Cougar Town*”), Laura Niles (“*Californication*”) and Josh Cruze (“*Collateral*”). [Ex. F (BTL_000351)]

(3) SERIOUS NATURE OF *THE TWILIGHT SAGA*

172. According to the Wikipedia page for *Twilight (series)*, “*Twilight* is a series of four vampire-themed fantasy romance novels by American author Stephenie Meyer. It charts a period in the life of Isabella “Bella” Swan, a teenage girl who moves to Forks, Washington and falls in love with a 104-year-old vampire named Edward Cullen. The series is told primarily from Bella’s point of view . . . The series is most popular among young adults [and] won the 2009 Kid’s Choice Award for Favorite Book.” [Ex. M (BTL_000669-670)]

173. The wikipedia page for the *Twilight (series)* lists the genre of the *Twilight* books as “Romance, fantasy, young-adult fiction.” [Ex. M (BTL_000669)] Stephenie Meyer states that she considers her books as “romance more than anything else.” [Ex. M (BTL_000674)]

174. According to the Wikipedia page for *The Twilight Saga (film series)*, “*The Twilight Saga* is a series of five romance fantasy films.” [Ex. X (BTL_001345)]

175. *The Twilight Saga* has been widely criticized by female activists as “promoting, normalizing and idealizing an emotionally and physically abusive relationship” that is highly demeaning to women.

176. The Parents Television Council have warned parents that the relationships depicted in *The Twilight Saga* films reportedly meet “all fifteen criteria set by the National Domestic Violence Hotline for being an abusive relationship.” [Ex. M (BTL_000680)]

177. The *Twilight Saga* has also been heavily criticized by civil rights activists and academic scholars for perpetuating one-dimensional stereotypes about Native American heritage and indigenous culture through the depiction of the character Jacob Black as a “noble savage,” “bloodthirsty warrior” and “sexual predator.” There is heavy emphasis throughout Defendants’ copyrighted works on socio-political hierarchy and economic power based on the color of a character’s skin rather than the content of his or her character or accomplishments. [Ex. R (BTL_001052-1056)]

178. Numerous scholars have attempted to characterize *The Twilight Saga* as an allegory for Mormon theology based on Stephenie Meyer’s religious faith. However, while the public record of such critique is noteworthy, Plaintiff declines to make religion an issue in this litigation because there was no attempt to parody or comment upon any theological beliefs or religious customs in Plaintiff’s motion picture.

179. *The Twilight Saga* movies, which are based on Stephenie Meyer’s books, are heavily marketed to children. However, they deal with a variety of mature themes including teen pregnancy, ephebophilia, addiction, date rape, teen infatuation, depression, immortality, revenge, cannibalism, suicide, murder, graphic displays of inhumane violence and death.

180. The main plot of *The Twilight Saga* centers around the lustful and eventually sexual relationship between a seventeen-year-old girl, Bella Swan, and a male character, Edward Cullen, who is nearly 100 years her senior.

181. There are constant references to addiction and infatuation such as when Edward refers to Bella as his “own personal brand of heroin” in describing his uncontrollable lust for her.

182. The final epic battle in the *Twilight Saga: Breaking Dawn Part 2* depicts over a dozen teenage actors being brutally decapitated and having their headless bodies set ablaze.

183. Defendants pass off these mature themes and graphic depictions of violence as

“family entertainment” and, in the context of the communications leading up to this litigation, have described the aforementioned material depicted in *The Twilight Saga* films as “essential, intrinsic and well-known [for its] wholesomeness.” [Ex. A (BTL_000034)]

(4) PARODICAL ELEMENTS OF *TWIHARDER*

184. It is precisely the contradiction between the deeply sincere, “wholesome” image that *The Twilight Saga* franchise claims to portray and the actual underlying adult themes present in the material that the *Twiharder* film successfully parodies.

185. *Twiharder* lampoons *The Twilight Saga*, specifically characters, scenes and dialogue from *New Moon*. The picture also parodies the celebrity status and personalities of the lead actors of the Twilight saga through humor, satire and ironic imitation. For example, Edward Cullen becomes “Bedford Mullen;” Jacob Black becomes “JB Lycan” and Bella Swan becomes “Stella Pond”

186. *Twiharder* is a parody or pastiche of *New Moon* because the caricatures comment on the original work by using humor, satire, travesty, mock-epic, mock-heroic and ironic imitation to point out absurdities in the plotline, acting and dialogue of *The Twilight Saga: New Moon*, as well as its treatment of serious and mature themes.

187. *Twiharder* pokes fun at the overly lustful characters and dialogue, questionable acting, generic plot lines, and veiled mature themes.

188. *Twiharder* parodies the intense romantic interest that Edward Cullen shows for Bella Swan in *The Twilight Saga* series by depicting the caricature Stella Pond as physically unattractive to *Bedford Mullen*, who is constantly attempting to change her appearance.

189. The *Twiharder* parody repeatedly comments on the age difference between the two main characters of *Twilight* and uses a variety of spoofs and references to other popular culture subjects to do so, such as the television show, *To Catch A Predator*.

190. Various scenes depict awkward lip biting, overly dramatic crying which goes on for days, and incredibly long, lustful gazes. In one scene, Bedford Mullen (inspired by Edward Cullen) says “I love you” to Stella Pond (inspired by Bella Swan) over and over while a clock shows an excessive amount of time passing to comment on the dialogue in the *Twilight* film and the much used phrase “I love you” between the two characters in the *Twilight* film.

191. In a classroom scene where Bedford and Stella are sharing a one-person desk and watching a romantic movie, Bedford locks eyes with Stella and entrances her with his powerful gaze for an exaggerated amount of time and proceeds to do the same with another student in the class, the teacher, and even the actor in the movie being played for the class through the television monitor. This imitative reference is parodying a specific scene in *New Moon* where Bella and Edward are watching *Romeo and Juliet* in class to comment on the characters' obsession with one another and Edward's entrancing effect on others

192. *Twiharder* parodies the depiction of Jacob Black's tribe in *New Moon*, which casts young, physically fit Native American men as sexual objects, through references to caricatures of homoerotic flamboyance. [Ex. F (BTL_000338)]

193. JB Lycan, who is a caricature of *Twilight's* Jacob Black, roams throughout the *Twiharder* movie with his shirt off, displaying an impressive set of abdominal muscles. In a motorcycle scene where Stella hits her head and JB Lycan (inspired by Jacob Black) attempts to clean up her blood by rubbing her head with his washboard abs, making her wound exponentially worse. This is parodying a specific scene in *New Moon* where Jacob cleans Bella's bloody head with his t-shirt to comment on the excessive exposure of Jacob's six-pack throughout the *Twilight* films.

194. *Twiharder* criticizes the one-dimensional racial typecasting evident in *The Twilight Saga: New Moon* by lampooning a stereotypical “Latina Chica,” a “Black Girl,” and a

“White Girl.” [Ex. F (BTL_000351)]

195. *Twiharder* uses only as much as necessary from the Defendants’ targeted work to evoke the *Twilight* narrative and there is a substantial number of original elements in the newly created work, including original storylines, characters, dialogue and musical compositions. Indeed, as evidenced a comparison of the screenplays to *Twiharder* and *New Moon*, the great majority of scenes in *Twiharder* are entirely original and have no direct reference to any comparable scene in *New Moon* (or any other *The Twilight Saga* film). [Ex. P (BTL_000771-981)]

196. *Twiharder* does not exclusively target *The Twilight Saga* as the object of criticism. Instead, the film pokes fun at a broad array of entertainment subjects drawn from various works of film, television, videogame, song, and literature, including the videogame franchise Super Mario Brothers; the popular song by Right Said Fred titled “I’m Too Sexy”; the television shows *To Catch a Predator*, *True Blood*, and *The Brady Bunch*; the celebrity gossip outlets, TMZ and Extra; the actor Ted Danson; and finally, Romeo and Juliet. In this way, *Twiharder* embodies the a similar parodical approach as that found in *Vampires Suck*.

197. *Twiharder* comments on the celebrity status and fan-crazed followers of the *The Twilight Saga*’s two primary actors, Robert Pattinson (“Team Edward”) and Taylor Lautner (“Team Jacob”). In other words, Plaintiff’s *Twiharder* film makes reference to it being a movie throughout the picture, while *New Moon* does not. For example, *Twiharder* contains various scenes depicting movie audiences in theaters who are watching and commenting upon the film as it actually takes place. At one point, a main character interacts with the audience and says: “Just watch the movie. Everyone wants to be a critic.” This fundamental difference in perspective not only makes the parody transformative and transparent that *Twiharder* is a parody, but it also provides a means for direct commentary on the original, targeted work.

198. There is also a scene in *Twiharder* where the three main characters are being interviewed on a talk show similar to *Extra*, thereby providing an opportunity to make jokes about the original plot line. After the interviews, a crowd of screaming, teenaged girls, a.k.a. “Twihards,” beg the actors for autographed headshots. These scenes poke fun at the fan base and celebrity culture of the actors depicted in *The Twilight Saga*.

(5) PROMOTION OF *TWIHARDER*

199. At all relevant times, Plaintiff has expressly, overtly and transparently marketed its webisodes and feature-length film as “parody” and “spoof,” similar to Defendants’ own marketing of *Vampire Sucks* and *Breaking Wind*.

200. Indeed, the very title of Plaintiff’s movie, *Twiharder*, invariably excites laughter in those who hear it for the first time. The title itself is parodical in nature and serves to defeat any claim by Defendants that Plaintiff’s marketing of its film is confusingly similar to Defendants’ *The Twilight Saga*.

201. As described by Plaintiff on their movie page at www.twiharder.com: Plaintiff’s promotional materials and trade dress are entirely consistent with *Twiharder*’s transparent intent to parody *The Twilight Saga*. [Ex. F [(BTL 000320-363)]

If you are an intense fan of the *Twilight Saga*, then you have nothing in common with the creators of "TWIHARDER"!

In a land where vampires can sunbathe, werewolves turn into clogs, and homosexuals battle for their right to be fabulous, Bedford Mullen (John Gearries) fights to protect his love with Stella Pond (Tanya Zoeller). After realizing that Stella Pond is not really that sexy Bedford decides to take matters into his own hands - through his magical touch.

In the meantime JB Lycan (Christopher Sean) is doing his best to make a name for himself with the “In Crowd” at high school. After being turned down for a date with Stella Pond, he feels it's time to change his look for the better and give Stella what she's really been looking for ... Abs, Abs, & MORE ABS!

Bedford soon realizes that he must have every single woman in the world strung from his jock and JB Lycan can well KICK ROCKS and CHOKE ON SOCKS. That doesn't sit too well with JB, and things end up mucho violente!!! (That's Spanish for very violent!!!)

“TUIHARDER” is going to take you to a world where vampires and werewolves become Hollywood celebrities, and love is something that is just not that hard to find.

202. Plaintiff also maintains a website at www.Tuiharder.com to serve as promotion for Plaintiff's film. [Ex. F (BTL_000348-349)]

ANTI-COMPETITIVE CONDUCT

A. CONTINUING VIOLATIONS

(1) ORDINARY COURSE OF BUSINESS PRACTICE

203. Back in 2010, the website www.SuperLawyers.com published an article about Attorney David C. Friedman, former executive vice-president and general counsel at SUMMIT and current deputy general counsel of LIONSGATE, and the success of *The Twilight Saga* franchise. SUMMIT's intellectual property enforcement policy was described as follows:

Friedman doesn't get in the courtroom much on behalf of Summit, but he and his team do have to patrol the trademark. "We have the good fortune of being able to merchandise the film, which doesn't happen all the time," he says. "So far we have over 100 licenses for different products, like Tshirts, makeup, that sort of thing. But bizarre unlicensed stuff, like adult toys, gets out there."

A cease-and-desist is the typical response; taking court action is a last resort. "You can't control piracy," he says. "We employ a few different firms to get stuff down off the Internet, and we have people searching Craigslist and eBay. But we also realize we have a very avid fan base, and we're very aware of fan sites and fan fiction. Some are actually very creative. We try to let the fans do what they want to do." [Ex. E (BTL_000233-319)]

(2) PATTERN OF PREDATORY CONDUCT

204. In accordance with Defendants' ordinary course of business of using cease-and-desist letters as a "typical response" vis-a-vis independent artists, Defendants have previously issued takedown notices to the author of a third-party *Twilight* parody posted on Youtube. The Fine Brothers, creators of several YouTube-based comedy series, made an interactive collection of videos parodying the *Twilight* werewolf versus vampire love triangle in the style of an 8-bit game. It made innovative use of YouTube's annotation feature, allowing users to pick one of two options at the end of a video, which took users to one of two new videos. ***Although it is obviously a parody and doesn't even use any actual Twilight content, Summit Entertainment***

issued a DMCA takedown notice for the videos and, at the risk of losing safe-harbor status, YouTube complied.” [Ex. K (BTL_000501)].

205. In 2009, SUMMIT demanded that Zazzle.com, which permits users to print and sell their own clothing designs, removed its users’ *Twilight*-themed T-shirts from its site. In contrast, Zazzle’s competitor CafePress.com was permitted to sell similar wares. Upon information and belief, this was primarily because Defendants’ IP counsel, Attorney Pietrini, also happens to represent CafePress.com in its other business affairs.

206. In February 2010, SUMMIT sued U.S.-based documentary filmmakers for attempting to market a DVD about the town of Forks, Washington which was (falsely) portrayed as the setting for *The Twilight Saga* movies (but not the actual Stephenie Meyer books upon which the movies were based). The crux of SUMMIT’s claims was that only SUMMIT should be permitted to distribute a documentary about the town of Forks in relation to Defendants’ tentpole franchise.

207. SUMMIT also sued fashion line BB Dakota, which truthfully advertised that one of its jackets — which it subsequently renamed the “Bella Jacket” — had been worn by Kristen Stewart’s character. SUMMIT demanded that BB Dakota “deliver to Summit for destruction” each of the jackets, saying they had illegally been given the Bella name. [Ex. K (BTL_000497-98)]

208. In 2010, a cosmetic retailer named Limited Brands sued SUMMIT after receiving a cease-and-desist letter from SUMMIT alleging that the “Twilight Woods” name on one of Plaintiff’s *Bath & Body Works* cosmetic lines infringed upon SUMMIT’s exclusive rights “to the ‘hues of brown’ and ‘tree branches in differing color’” on *Twilight* promotional materials, a color palette similar to that used on *Bath & Body Works*’ “Twilight Woods.” [Ex. K (BTL_000505)]

209. SUMMIT was also sued by an independent singer/songwriter known as Matt Heart who was victimized by Defendants' unlawful C&D tactics. See, Smith vs. Summit Entertainment, LLC, 2011 WL 2200599, No. 3:11-CV-348 (N.D. Ohio June 6, 2011) (sustaining claim against SUMMIT under 17 U.S.C. § 512 for wrongful assertion of copyright infringement where SUMMIT caused the "take down" of plaintiff's pre-existing copyrighted song solely because of the *tradedress* used by Plaintiff to promote the CD).

(3) EARLY WARNING SIGNS

210. On July 8, 2010, a visiting fellow at YALE LAW SCHOOL's Information Society Project named Christina Mulligan contributed an article to the WASHINGTON POST / LOS ANGELES TIMES, entitled *The Twilight Saga: Forbidden Love and T-Shirts*. [Ex. K (BTL_000497-98)].

211. In Ms. Mulligan's "wake-up call" piece, published almost three years ago, she adroitly explained how Defendant SUMMIT's anticompetitive conduct in the WMPI was contrary to the spirit and intent of U.S. Copyright laws. Her nationally-publicized commentary foreshadowed some of the identical issues now brought before this Honorable Court.

"[W]hen it's not breaking box office records, Summit Entertainment, the studio that made the *Twilight* series, is doing its best to make sure that if you want to see a vampire brooding, you do it through Summit ... ***The company seems to be lobbying lawsuits at pretty much anyone*** who uses *Twilight's* name or images without its permission.

Naturally, Summit is trying to maximize profits from the *Twilight* franchise. It understandably wants to prevent the bootlegging of *Twilight* DVDs...***But its lawsuits go far beyond curbing piracy and end up limiting how we can talk about pop culture*** ...The law may be on Summit's side in some cases, but ***the spirit of what the company is doing — shutting down almost anyone referencing Twilight without its permission — shows the shortcomings in how we understand and interpret copyright law.***

By suing a fan magazine, a platform for fan-made T-shirts and a documentary filmmaker, Summit is attacking speech that should be free.

It shouldn't matter that these works are made for profit — speech is no less important because it is sold. And if Summit can sue these entities, it can sue amateurs as well.

The law's ambiguity, especially copyright law's fair use defense, along with the high costs of civil litigation and the possibility of huge punishments for infringement, will probably push several parties to reach settlements.

Moreover, the recording and film industries have set the terms of the debate about intellectual property in recent years, pushing the view that almost any use of a work without permission is or should be illegal.

They have lumped those actively engaged in creation, such as fan-fiction writers and video re-mixers, together with those who slavishly copy entire films or masquerade knock-offs as official merchandise.

Nonetheless, Congress and the courts should reflect on Summit's aggressive lawsuits and choose to embrace the values at the heart of artistic protection: the promotion of knowledge and learning.

Pictures, videos and slogans on T-shirts are tools of modern expression, and with a phenomenon as omnipresent as *Twilight*, ***fans should be free to engage, manipulate, remix and remake. Free speech is just too important for anything less.*** [Ex. K (BTL_000498)] (emphasis added)

212. Ms. Mulligan's article inspired other media commentators, like Katy Tasker of www.publicknowledge.org, to write about SUMMIT's anticompetitive conduct in July 2010, echoing the very same issues before the Court here in May 2013.

Summit ... seem[s] to be under the misguided impression that they should have absolute power and control over their intellectual property, but, as Mulligan thoughtfully points out, the Supreme Court spelled out in *Sony v. Universal City Studios* back in 1984 that **copyright "has never accorded the copyright owner complete control over all possible uses of his work."** **A copyright is a government-granted monopoly, not a divine right**—and should be treated as such...People seem to forget why there are limitations on the control a copyright holder can assert over his content: **there are certain fundamental principles (like free speech) that we hold in a higher regard and that we cannot risk devaluing for the benefit of a rights holder.** [Ex.K (BTL_000501)]

(4) “RIDICULOUS-TO-INSANE OVERREACHES OF IP LAW”

213. The obvious lack of any *practical*, well-defined law to deter Defendants in

furtherance of its anticompetitive C&D tactics has led to a continued course of violations that has devolved into what veteran media observers have described as “ridiculous-to-insane overreaches of intellectual property law”. [Ex. K (BTL_000583-584)]

214. On March 19, 2013, www.techdirt.com¹⁹ reported on yet another one of Defendants’ “asinine” Takedown notices. Just two months before the filing of this Complaint, Defendants issued a takedown notice to Dazzle.com in connection with a 100% original painting / sketch created by artist Kelly Howlett on November 20, 2009. The painting had no relation whatsoever to Defendants’ trademarks nor copyrights. As reported, Defendants issued the takedown notice solely based on claims to owning *the calendar date* 11-20-09, which is when Defendants’ *The Twilight Saga: New Moon* was released theatrically. The journalist commented as follows:

Summit Entertainment, the movie studio behind the *Twilight* films, is no stranger to ***ridiculous-to-insane overreaches of intellectual property law. In fact, the studio seems to make a habit out of it.*** The company has sued Zazzle because some of its users made fan art inspired by *Twilight*. It's shut down a *Twilight* fanzine. It's said that only it can make a documentary about the real town where the fictional *Twilight* story is based. It's sued to stop a fashion designer from factually stating that a character in one of the movies wore its jacket. It shut down a silly 8-bit YouTube game. It issued a takedown on a song that was written years before the *Twilight* movies. It went after Bath & Bodyworks for daring to to sell a body lotion called *Twilight Woods*, which had nothing to do with the movies. It aggressively sued a fan and pressed criminal charges for tweeting some behind the scenes photos of a *Twilight* movie. It also sued the guy who registered *twilight.com* back in 1994.

This is a company that thinks that the world revolves around its trademarks, and it appears to have little concern for what the law actually says...

[SUMMIT] has such a long and consistent history of abusing intellectual property law, isn't there a point at which we just say that the

¹⁹ Started in 1997, the “Techdirt blog uses a proven economic framework to analyze and offer insight into news stories about changes in government policy, technology and legal issues that affect companies ability to innovate and grow.” <http://www.techdirt.com/about.php>

company no longer deserves any such power? If you regularly abuse monopoly privileges, shouldn't they be taken away? [Ex. K (BTL_000583-584)]

B. DISTRIBUTION OFFER

(1) GRAVITAS VENTURES

215. Gravitas Ventures (“GRAVITAS”) specializes in the aggregation of entertainment content for worldwide distribution via established and evolving platforms in cable Video on Demand (VOD), broadband, mobile and airline/hospitality industries. [Ex. S (BTL_001081)]

216. GRAVITAS provides the “the single point of contact for studios/operators and handles all logistics to acquire content rights, secure errors and omissions insurance, and supply marketing materials, screeners and film masters.” [Ex S. (BTL_001085)]

217. GRAVITAS partners with major motion picture industry leaders, including Warner Brothers, to position the projects of independent producers, such as Plaintiff, in the Home Video market, particularly the Video-On-Demand (“VOD”) markets (Cable / Satellite / IPTV) such as *Verizon Fios, Time Warner Cable, Direct TV, Comcast, Rogers, Cablevision, Dish Network, AT&T, Cox and Charter*. GRAVITAS also provides independent film producers access to on-line VOD providers such as *Netflix, PS3, Amazon Video, Apple iTunes, Xbox 360, CinemaNow, Wii, and Walmart Vudu*. [Ex. S (BTL_001084)]

218. From the perspective of independent filmmakers such as Plaintiff here, GRAVITAS provides distribution access to “up to 100 million+ cable, satellite, hotel, airline & online PPV/VOD consumers” [Ex. S (BTL_001085)] and over *1 billion* homes worldwide. [Ex. S (BTL_001101)]

(2) LICENSING AGREEMENT

219. On March 16, 2012, Plaintiff initiated contact with GRAVITAS via e-mail [Ex. S (BTL_001111)]:

Between the Lines Productions has recently finished our newest feature film “TwiHarder”, a parody of “Twilight.” For more information and trailers please visit the movie's website at www.twiHarder.com. TwiHarder is a SAG Feature Film with a talented cast and hilarious content The executive producers are actively searching for a distributor. If interested in viewing the feature film Between the Lines Productions is happy to send a hard copy via U.S. mail to your acquisitions department for consideration.

220. On March 23, 2012, GRAVITAS wrote to Plaintiff, indicating that it was interested in screening the *TwiHarder* film with the intent to consider it for distribution to 1 billion homes. [Ex. S (BTL_001108; 112-13)]:

Gravitas Ventures is potentially interested in licensing *TwiHarder* to its North American clients for the following media: cable video on demand (VOD), satellite pay per view (PPV), hotel pay per view, internet video on demand (IVOD), and electronic sell through (EST). Strategically, we believe there may be a great opportunity with this film through our partner Warner Brothers Digital Distribution (WBDD), as we work closely with them on many high quality new release films.

221. On April 10, 2012, GRAVITAS indicated that it was interested in pitching *TwiHarder* to Warner Brothers Digital Distribution (“WBDD”). [Ex. (BTL_001115)]

222. On April 11, 2012, GRAVITAS indicated that it would send a license agreement to Plaintiff “ASAP” and that it was intending to pitch *TwiHarder* to WBDD on April 19, 2012. [Ex. (BTL_001117-18)]

223. On April 12, 2012, GRAVITAS e-mailed Plaintiff its “standard license agreement.” [Ex. (BTL_001119-)]. The terms of the proposed agreement indicated that the territory for distribution would be “worldwide”. The rights licensed would include:

Exclusive Transactional VOD Rights, Subscription VOD Rights, Ad-sponsored VOD Rights, PPV Rights, Hotel VOD Rights, MOD Rights, Airline Rights, Cruise Ship Rights, Military Base Rights, Maritime

Rights, Wireless Rights, Non-Theatrical Rights and Incidental Rights (as defined in the License Agreement Standard Terms and Conditions).

224. On April 25, 2012, GRAVITAS indicated that it had distributor affiliations interested in considering *Twiharder* for release on packaged media such as DVD. [Ex S. (BTL_001136)]

225. On May 2, 2012, GRAVITAS indicated that it would pitch *Twiharder* to WBDD for release in September 2012. [EX S. (BTL_001139)]

226. From May 22, 2012 through June 7, 2012, GRAVITAS and Plaintiff continued to negotiate the terms of the license agreement.

227. On June 11, 2012, Plaintiff informed GRAVITAS that it had retained an attorney to provide a “fair use” clearance letter on the film.

Once we have the fair use clearance letter we can then obtain E&O insurance and would be comfortable signing the agreement. Christopher and I don't want to have any problems obtaining the deliverables after signing the agreement and its possible obtaining the fair use letter from the law firm could delay this. If the law firm we hired believes we should alter or remove anything from the film then we would have to create the deliverables all over again which we want to avoid at all costs.

Immediately after we have the fair use clearance letter we are happy to sign, obtain the deliverables and E&O insurance. [EX. S (BTL_001150)]

228. On June 21, 2012, GRAVITAS e-mailed Plaintiff to check on the “fair use review” by Plaintiff’s attorney. GRAVITAS stated:

Ideally, WB will be most interested in the film for Oct or Nov [2012] to coincide with the new *Twilight* movie. [Ex. S. (BTL_001151)]

229. On June 30, 2012, Plaintiff e-mailed GRAVITAS indicating that their attorney’s fair use letter was sent to Chubb E&O Insurance. [Ex. S (BTL_001152)]

230. On July 2, 2012, GRAVITAS indicated that “if all goes well with Chubb, etc., we’ll be able to present *Twiharder* to WBDD for a possible November release. This could be extremely well-timed with the release of the last TWILIGHT film coming out on November

16th.” [Ex. S. (BTL_001152)]

231. On July 3, 2012, Plaintiff transmitted the Chubb E&O policy quote to GRAVITAS, which confirmed that the insurance policy would be “fine” and that “we should be good to go then.” [Ex. S (BTL_001153-54)]

C. E&O INSURANCE

232. Errors and omission (“E&O”) insurance is professional liability insurance that protects companies and individuals against claims arising out of inadequate work or negligent actions. In the motion picture industry, E&O insurance is “rated based on gross production cost of the show budget and E&O requirements of network/distributor. It is rated on a per project basis or TV Series basis.” [Ex. T (BTL_001160)]

233. GRAVITAS required that Plaintiff obtain E&O insurance in connection with the distribution licensing deal for *Twiharder*.

234. On May 31, 2012, Plaintiff submitted its application to an insurance brokerage agency called American Entertainment Insurance (“AEI”). [Ex. T (BTL_1160-1161)]

235. On June 1, 2012, AEI indicated that in addition to the E&O insurance application, AEI would also need a copy of the GRAVITAS distribution contract, which Plaintiff provided to AEI shortly thereafter. [Ex. T (BTL_001162)]

236. On June 4, 2012, AEI provided Plaintiff with an E&O quote from Chubb Insurance (“CHUBB”) for one-year and three-year insurance policies. [Ex. T (BTL_001163)]

237. On June 5, 2012, AEI indicated that it had accepted Plaintiff’s application for E&O Insurance with CHUBB on the basis of the proposed GRAVITAS licensing deal. [Ex. T (BTL_001173)]

238. On June 5, 2012, AEI indicated that the E&O underwriter of Hiscox Insurance

had requested an “opinion letter from the insured’s attorney on the parody and fair use aspect of the film.” [Ex. T (BTL_001167)].

239. On June 5, 2012, AEI further indicated that the “Chubb Underwriter is also requesting to review a Legal Opinion Letter regarding the Fair Use Doctrine. This document is needed Prior to Binding the Policy.” [Ex. T (BTL_001169)]

240. On June 5, 2012, at 3:02 p.m., Plaintiff asked whether there were any policy holders that didn’t require the Fair Use Review letter. [Ex. T (BTL_001188)]

241. On June 5, 2012, at 3:29 p.m., AEI responded to Plaintiff, stating that “All Insurance Carriers will Require the Legal opinion Letter due to the nature and subject matter of your film.” [Ex. T (BTL_001188)]

D. “FAIR USE” LEGAL OPINION

(1) DONALDSON & CALLIF

242. On June 8, 2012, as required by AEI, Plaintiff retained the Los Angeles-based IP law firm of DONALDSON & CALLIF to draft a “Fair Use” Legal Opinion letter. The firm’s founding partner, Michael C. Donaldson, Esq. is a well-known entertainment attorney and celebrated author of intellectual property law books, including *Clearance & Copyright* and the AMERICAN BAR ASSOCIATION’S *Legal Guide to Independent Filmmaking*. Attorney Donaldson’s publications are taught in many accredited law schools.²⁰

243. On June 15, 2012, the DONALDSON law firm provided a preliminary Opinion Letter to Plaintiff, cc’d to AEI, concerning the film *Twiharder*.

²⁰ Attorney Donaldson’s accomplishments are vast. He served on the Advisory Committee for the *Documentary Filmmakers Statement of Best Practices in Fair Use* and serves on the *Advisory Committee of the Stanford Fair Use Project*. He negotiated with Media Professional Insurance Companies to offer fair use riders on the E&O insurance policies which allowed many films to be made under the Fair Use doctrine. He helped draft Orphan Works legislation, as well as, the *Rome Resolution* to harmonize Fair Use across the European Union.

[Twi harder] lampoons the *Twilight* saga, specifically characters, scenes and dialogue from the films *Eclipse* and *New Moon*. The Picture also parodies the celebrity status and personalities of the lead actors of the *Twilight* saga through humor, satire and ironic imitation. You do not have releases from the actors or written permission from the copyright owner for any characters of the *Twilight* saga. We are of the opinion that the use of all unlicensed, copyrighted materials from the *Twilight* saga fall within the parameters of the fair use laws and therefore constitute fair use.

The primary purpose of this opinion letter is so that you may obtain fair use coverage under your E&O Policy. [Ex. A (BTL_00001)] (emphasis added)

244. On June 18, 2012, AEI relayed the response to the DONALDSON firm's "Fair Use" Legal Opinion from CHUBB's Underwriter, indicating that "The opinion letter looks favorable. However, to really feel comfortable with the fair use we would like to see the attorney analysis that outlines the reasons why this falls into fair use." [Ex. T_(BTL_001194)]

245. On June 19, 2012, AEI indicated that it had transmitted the DONALDSON firm's "Fair Use" Opinion Letter to four companies: CHUBB, Hiscox Insurance, Axis Insurance, OneBeacon Insurance. [Ex. T (BTL_001196)]

246. On June 20, 2012, AEI informed Plaintiff that "based on the nature of this production, for CHUBB to be more comfortable with this risk, they would like to see the attorneys' analysis to confirm they have satisfied the criteria for fair use." [Ex. T_001199]

247. On June 28, 2012, at the request of AEI and CHUBB, the DONALDSON law firm provided a follow-up Legal Opinion Letter to Plaintiff concerning the film *Twi harder* after reviewing a final cut of *Twi harder* on DVD. The letter cited the four "Fair Use" factors of Section 107 of the Copyright Act of 1976 and carefully analyzed each factor, again concluding that "we are of the opinion that the use of all unlicensed, copyrighted materials from the *Twilight* saga fall within the parameters of the fair use laws and therefore constitute fair use." [Ex. A (BTL_000009-10)] (emphasis added)

(2) CHUBB’S APPROVAL

248. On July 3, 2012, AEI e-mailed Plaintiff and the DONALDSON firm indicating that “CHUBB has agreed to add the fair use endorsement.” [Ex. A (BTL_001213)] At the time of CHUBB’s approval, CHUBB had not yet been notified of the 6/27/12 Cease-and-Desist Letter.

249. Shortly after receiving approval from CHUBB to move forward with the E&O Insurance, Plaintiff’s counsel disclosed to CHUBB that the 6/27/12 C&D letter had been received from the Defendants.

E. CEASE-AND-DESIST

(1) DEFENDANTS’ INITIAL C&D

250. On June 27, 2012, Defendants transmitted a sham “cease-and-desist” letter to Plaintiff via e-mail and U.S. mail alleging that Plaintiff’s feature film *Twiharder* and its supporting promotional materials constituted “trademark infringement, copyright infringement, false designation of origin, and dilution of [Defendant] Summit’s intellectual property derived from the *Twilight* motion pictures.” (the “6/27/12 C&D Notice”) [Ex. A (BTL_000004-7)]

251. In the 6/27/12 C&D Notice, Defendants anticipated the Plaintiff’s “Fair Use” defense and dismissed it in conclusory fashion:

Notably, Between the Lines Productions’ attempt to characterize the Movie as a parody does not immunize Between the Lines Productions from liability. The Movie has created and will continue to create consumer confusion and dilution under the trademark laws and is substantially similar under the Copyright Act. The Movie likewise will not qualify as fair use under the trademark or copyright laws. Between the Lines Productions has appropriated substantial elements from the *Twilight* Motion Pictures for a commercial purpose. **There is nothing “fair” about the use. Rather, the Movie is a wholesale exploitation of Summit’s valuable intellectual property rights in the *Twilight* Motion Pictures.** [Ex. A (BTL_000006-7)] (emphasis added)

252. Shortly after receipt of the 6/27/12 C&D Notice, Plaintiff forwarded the letter to

the DONALDSON law firm for its review.

(2) PLAINTIFF'S INITIAL RESPONSE TO THE C&D

253. On July 12, 2012, the DONALDSON firm responded to Defendants' counsel, denying all such allegations of copyright and trademark infringement and stating that Defendants' purported legal claims were without merit based on Plaintiff's "Fair Use" through parody. [Ex. A (BTL_000012)]

F. REVOCATION & LOCK OUT

(1) CHUBB'S REVOCATION

254. On July 16, 2012, AEI notified Plaintiff and the DONALDSON firm that after reviewing the 6/27/12 C&D letter and the Donaldson firm's 7/12/12 response thereto, CHUBB had decided to withdraw its offer to provide E&O insurance for the *Twiharder* film. AEI further indicated that "If Chubb declined, there is a strong possibility that all the other E&O Carriers may decline as well." [Ex. T (BTL_001266)]

255. On July 17, 2012, AEI forwarded CHUBB's official response to Plaintiff:

Given our concerns since receipt of the cease and desist letter, along with the opinion of our independent clearance counsel, we are going to going to hold our position and decline to offer terms." [Ex. T (BTL_001268)]

(2) GRAVITAS' REVOCATION

256. On or about July 16, 2012, Plaintiff disclosed to GRAVITAS that CHUBB had withdrawn on the basis of Defendants 6/27/12 C&D Notice.

257. On July 24, 2012, at 10:32 a.m., GRAVITAS indicated that after communicating with WBBB, GRAVITAS had decided to cancel the distribution deal negotiations with Plaintiff based on Defendants' 6/27/12 C&D Notice. [Ex. S (BTL_001156)]

258. On July 24, 2012, at 11:45 a.m., Plaintiff asked whether GRAVITAS could

move forward with distributing the *Twiharder* film if Plaintiff was able to obtain E&O Insurance. GRAVITAS responded in the negative:

At this point, I don't think we [GRAVITAS] can do it. We've been involved in situations such as this in the past where *a large studio has leaned on our distribution partners to take down a particular film*, even if the legal justification for doing so is very disputable. [Ex. S (BTL_001157)] (emphasis added)

259. On July 24, 2012, at 12:19 p.m., Plaintiff asked GRAVITAS whether it would be interested in distributing the film if Plaintiff were able to “obtain some sort of retraction letter from Summit’s counsel.” GRAVITAS responded:

Yes, we'd definitely reconsider if you obtained that. We want to avoid a situation in which you incur delivery costs, we put the film out in the VOD market, then a host of cease-and-desist letters from [Defendant] Summit prompt the various platforms to take the film down. [Ex. S (BTL_001157-58)]

[NEXT]

CHRONOLOGY of MOTION PICTURE RELEASES

	Motion Picture Title	Relevant Antitrust Market	Market Genre (Rating)	Theatrical Release Date (Distributor)	Home Video Release Date (Distributor)
1	TWILIGHT	A	Teen Fantasy / Vampire Romance (PG-13)	Nov. 21, 2008 (Summit)	Mar. 21, 2009 (Summit)
2	THE TWILIGHT SAGA: NEW MOON	A	Teen Fantasy/ Vampire Romance (PG-13)	Nov. 20, 2009 (Summit)	Mar. 20, 2010 (Summit)
3	TWILIGHT IN FORKS: SAGA OF THE REAL TOWN	B	Documentary (NR)	n/a	Mar. 20, 2010 (Summit)
4	VAMPIRE SUCKS	Z	Parody / Spoof Horror Comedy (PG-13)	Aug. 18, 2010 (Fox)	Nov. 30, 2010 (Fox)
5	THE TWILIGHT SAGA: ECLIPSE	A	Teen Fantasy/ Vampire Romance (PG-13)	June 30, 2010 (Summit)	Dec. 4, 2010 (Summit)
6	DESTINATION FORKS: THE REAL WORLD OF TWILIGHT	B	Documentary (NR)	n/a	Dec. 4, 2010 (Summit)
7	THE TWILIGHT SAGA: MUSIC VIDEOS	B	Documentary (NR)	<u>n/a</u>	Dec. 4, 2010 (Summit)
8	THE TWILIGHT SAGA: BREAKING DAWN 1.0	A	Teen Fantasy / Vampire Romance (PG-13)	Nov. 18, 2011 (Summit)	Feb. 11, 2012 (Summit)
9	BREAKING WIND	Z	Parody / Spoof Horror Comedy (R)	Jan. 13, 2012 (Lionsgate)	Mar. 27, 2012 (Lionsgate)
10	BREAKING DAWN 2.0	A	Teen Fantasy/ Vampire Romance (PG-13)	Nov. 16, 2012 (Lionsgate)	Mar. 2, 2013 (Lionsgate)
11	TWIHARDER	Z	Parody / Spoof Horror Comedy (NR)	<u>EXCLUDED</u>	<u>EXCLUDED</u>
12	TWILIGHT: ALPHA MALES	B	Documentary (NR)	<u>n/a</u>	Jan. 1, 2013 (EntertainME US)
13	TWILIGHT IN VOLTERRA	B	Documentary (NR)	<u>n/a</u>	Mar. 22, 2013 (Gravitas Ventures)
14	TWILIGHT: ROBERT PATINSON AND TAYLOR LATNER	B	Documentary (NR)	<u>n/a</u>	2013 (EntertainMe Europe)
15	TWIIGHT: BROKEN HEARTS	B	Documentary (NR)	<u>n/a</u>	2013 EntertainMe Europe

COUNT I

DECLARATORY JUDGMENT

NON-INFRINGEMENT OF DEFENDANTS' COPYRIGHT INTERESTS PURSUANT TO THE FIRST AMENDMENT TO THE U.S. CONSTITUTION AND DEFENSE OF FAIR USE, COPYRIGHT ACT OF 1976, 17 U.S.C. §§ 101, 106-107

A. PLAINTIFF'S STANDING

(1) COPYRIGHT CLAIMANT

260. To have standing under the Copyright Act of 1976, a plaintiff must bring a claim arising from a registered copyright, 17 U.S.C. § 411(a), and the plaintiff must be the “legal or beneficial owner” of the copyright. 17 U.S.C. § 501(b).²¹

261. [P]roper registration is a prerequisite to an action for infringement.²² A certificate of copyright registration generates a presumption that the copyright is valid.²³

262. Here, Plaintiff's certificates of copyright registration, TXu 1-700-221 (effective June 21, 2010) [Ex. B (BTL_000048)], TXu001817945 (effective April 9, 2012) [Ex. B (BTL_000052)] and PAu 3-635-415 (effective April 11, 2012) [Ex. B (BTL_000056-58)] were duly perfected by the U.S. Copyright Office and therefore serve as evidence that Plaintiff's copyrights in the “motion picture” *Twiharder* are valid.

(2) COPYRIGHT AUTHORSHIP

263. “[A]n author is he to whom anything owes its origin; originator; maker.”²⁴

²¹ Newsome v. Brown, 209 Fed.App'x 11, 13 (2d Cir. 2006).

²² Whimsicality, inc. v. Rubie's Costume Co., Inc., 891 F.2d 452, 453 (2d Cir.1989); 17 U.S.C. § 411(a).

²³ Pem-Am., Inc. v. Sunham Home Fashions, LLC, 83 Fed. App'x 369, 371 (2d Cir. 2003) (citing 17 U.S.C. § 410(c)).

²⁴ Medforms, Inc. v. Healthcare Mgmt. Solutions, Inc., 290 F.3d 98, 107 (2d Cir. 2002).

264. Legal ownership “vests initially in the author or authors of the work.”²⁵

265. The principal members of Plaintiff Between the Lines Productions LLC are U.S. citizens John Andrew Gearries and Christopher Sean each of whom are listed authors of the underlying literary work (i.e., screenplay) associated with the *Twiharder* motion picture.

266. Because Plaintiff, Gearries and Sean created the motion picture *Twiharder* through independent means and methods of production, they must be deemed rightful owners of the copyrights at issue in this action.²⁶

267. Following is a table consisting of the copyright registrations owned by Plaintiff that are relevant to this matter.

#	Title	Registration Date	Copyright Number	Content	Citation
1	<i>Twiharder</i>	2010-06-21	TXu 001700221	Screenplay	Ex. B (BTL_000048-49)
2	<i>Twiharder</i>	2012-04-09	TXu 1-817-945	Screenplay	Ex. B (BTL_000052)
3	<i>Twiharder</i>	2012-4-11	PAu 3-635-415	Motion Picture	Ex. B (BTL_000056-57)

B. CASE OF ACTUAL CONTROVERSY: “FAIR USE”

(1) DEFENDANTS’ CEASE-AND-DESIST

268. On or about June 27, 2012, and continuing through the present, Defendants have alleged that Plaintiff has infringed its copyrights to the motion pictures “*Twilight*,” “*The Twilight Saga: New Moon*,” and “*The Twilight Saga: Eclipse*.” [Ex A. (BTL_000004-6)]

269. Defendants attached a total of three (3) separate and divisible copyright registrations to their 6/27/12 C&D Notice. Such registrations consisted of copyrighted “motion pictures” in their entirety.

²⁵ 17 U.S.C. § 201(a).

²⁶ 17 U.S.C. § 201(a).

270. Defendants did not attach any copyright registrations protecting literary works, screenplays, books, photographic material or musical compositions to its sham C&D. Following is a table consisting of the copyright registrations which Defendants allege have been infringed by the copyrighted motion picture owned by Plaintiff:

#	Title	Registration Date	Copyright Number	Nature of Work	Citation
1	<i>Twilight</i>	2008-12-12	PA 1-616-599	Motion Picture	Ex. B (BTL_000060)
2	<i>The Twilight Saga: New Moon</i>	2009-11-24	PA 1-653-512	Motion Picture	Ex. B (BTL_000064)
3	<i>The Twilight Saga: Eclipse</i>	2010-07-2	PA 1-689-175	Motion Picture	Ex. B (BTL_000066)

(2) DECLARATORY JUDGMENT STANDARD, 28 U.S.C. §§ 2201, 2202

271. Defendants’ allegations of copyright infringement have created a “case of actual controversy” within this Court’s original jurisdiction pursuant to 28 U.S.C. § 2201 and Plaintiff may therefore seek a declaration of “the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”

272. Accordingly, pursuant to 28 U.S.C. § 2202, “[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.”

273. The controversy at bar arises over whether Plaintiff’s full length “motion picture” parody entitled *Twiharder*, bearing registration Copyright No. PAu 3-635-415, enjoys protection under the First Amendment to the Constitution of the United States (Amendment I) and constitutes a Fair Use under Section 107 of the COPYRIGHT ACT of 1976, 17 U.S.C § 107 as an affirmative defense to Defendants’ frivolous claims of copyright infringement.²⁷

²⁷ *Iowa State Univ. Research Found., Inc. v. American Broadcasting Co.*, 621 F.2d 57, 60 (2d Cir. 1980) (the doctrine of fair use “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”)

(3) FIRST AMENDMENT RIGHTS

274. Amendment I to the Constitution of the United States provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

275. The U.S. Supreme Court has noted that motion pictures are a particularly valuable form of free speech because they “may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.”²⁸

276. Accordingly, the U.S. Supreme Court recognizes that “expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.”²⁹

277. As noted by this District Court, “[s]ince ... motion pictures . . . are protected forms of expression, ... any restriction upon their dissemination must be carefully tailored in order to ensure full protection of First Amendment rights.”³⁰

278. Plaintiff’s feature-length motion picture *Twiharder*, which represents an original literary and cinematographic work of 100% independent creation, enjoys full protection under the First Amendment’s guarantee to all citizens of the right to engage in the free exchange of ideas through artistic expression.

²⁸ Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501, 72 S.Ct. 777, 780 96 L.Ed. 1098 (1952).

²⁹ Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502, 72 S.Ct. 777, 781, 96 L.Ed. 1098 (1952).

³⁰ St. Martin’s Press, Inc. v. Carey, 440 F.Supp. 1196, 1204 (S.D.N.Y. 1977).

(4) “FAIR USE” STANDARD, 17 U.S.C. § 107

279. Section 107 of the COPYRIGHT ACT OF 1976 provides as follows:

“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
- (2) the nature of the copyrighted work;*
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
- (4) the effect of the use upon the potential market for or value of the copyrighted work*

280. Once a work is determined to be a parody, the four factors cited in Section 107 are considered to determine whether it constitutes a Fair Use under the COPYRIGHT ACT.³¹

C. PURPOSE AND CHARACTER OF USE

(1) RADICALLY TRANSFORMATIVE

281. Plaintiff has endeavored to create the best parody³² targeting the motion picture entitled *The Twilight Saga: New Moon* as the primary object of ridicule and criticism.

282. *Twiharder* also employs the classic rhetorical devices of travesty³³, satire, farce,

³¹ *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826, 829 (S.D.N.Y. 1990).

³² WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1643 (1986) defines *parody* as a “writing in which the language and style of an author or work is closely imitated for comic effect or in ridicule often with certain peculiarities greatly heightened or exaggerated.”

³³ Travesty places characters from serious works in ridiculous situations and derives its comic effect from this ludicrousness.

mock heroic, mock-epic and caricature to convey its independent speech content to audiences.

283. Plaintiff's quintessential parody references elements from Defendants' pre-existing works in order to create a new, transformative work that comments on the original,

284. *Twiharder* directs its focus to the underlying material itself.

285. Plaintiffs' motion picture *Twiharder* is an original work of authorship; however it finds its inspiration through expressions of implied critique concerning certain themes propagated by *The Twilight Saga* movies, and is therefore dependent - in part - on the existence of Defendants' copyrighted work(s) for its own character.

286. Plaintiff's express and transparent purpose for targeting Defendants' copyrighted motion picture *The Twilight Saga: New Moon* is to mock, ridicule, criticize and comment upon the Defendants' novel treatment of what may otherwise be considered timeless elements of Hollywood movie-making: (a) attractive & misunderstood teenagers; (b) fantasy romance & lust; (c) physical violence & death; (d) supernatural or immortal powers; (e) typecasting.

287. *Twiharder* lampoons specific characters, scenes and dialogue from *New Moon* and parodies the celebrity status and personalities of the lead actors of *The Twilight Saga* for comedic effect. As described by Plaintiff on their movie page at www.twiharder.com:

If you are an intense fan of the Twilight Saga, then you have nothing in common with the creators of "TWIHARDER"!

In a land where vampires can sunbathe, werewolves turn into clogs, and homosexuals battle for their right to be fabulous, Bedford Mullan (John Gearries) fights to protect his love with Stella Pond (Tanya Zoeller). After realizing that Stella Pond is not really that sexy Bedford decides to take matters into his own hands - through his magical touch.

In the meantime JB Lycan (Christopher Sean) is doing his best to make a name for himself with the "In Crowd" at high school. After being turned down for a date with Stella Pond, he feels it's time to change his look for the better and give Stella what she's really been looking for ... Abs, Abs, & MORE ABS!

Bedford soon realizes that he must have every single woman in the world strung from his jock and JB Lycan can well KICK ROCKS and CHOKE ON SOCKS. That doesn't sit too well with JB, and things end up mucho violente!!! (That's Spanish for very violent!!!)

“TWIHARDER” is going to take you to a world where vampires and werewolves become Hollywood celebrities, and love is something that is just not that hard to find.

288. *Twiharder* is radically transformative of *New Moon* by virtue of “adding something new, with a further purpose or different character, or altering it with new expression, meaning, or message.”³⁴

289. As a surreal and bizarre parody, *Twiharder* does not function as a simple replacement for *New Moon* but functions to advance a new story.

290. The caricatures displayed in *Twiharder* comment on Defendants’ targeted works by using humor, satire and ironic imitation to point out absurdities in the plotline, acting and dialogue of the *Twilight Saga* films. The “motion picture” also comments on the celebrity status and fan-crazed followers of the *Twilight Saga* franchise.

291. *Twiharder* uses only as much as necessary from the original feature works to evoke the *Twilight Saga* movies and there is a substantial number of original elements in the newly created work, including original storylines, characters and dialogue.

292. *Twiharder* provides social benefits by shedding light on *New Moon* specifically and *The Twilight Saga* pop culture phenomenon generally, and exhibits a new creative work in the process.

(2) FEATURE FILM ≠ COMMERCIAL ADVERTISEMENT

293. Plaintiff’s full-length motion picture *Twiharder* is pure, intrinsic speech content:

³⁴ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

a “motion picture” parody that functions to excite laughter in audiences by lampooning another well-known motion picture.

294. *Twiharder* is NOT, when viewed upon its own merits, a commercial advertisement that proposes a transaction for goods or services. Nor does the *Twiharder* film include product endorsements or product placements embedded within the substantive content of the movie.

295. For purposes of the Copyright Act of 1976, *Twiharder* is not “commercial speech” because it is not commercial advertising that proposes its audience to enter into a commercial transaction.

296. Because *Twiharder* represents a radically transformative feature-length motion picture that was independently created and that required substantial time, energy, labor, financial resources, and personal / professional dedication to originate, Plaintiff naturally seeks to share the fruit of its artistic creation with the widest audience possible.

297. Consistent with the incentive of *any* artist-turned-copyright holder, Plaintiff seeks first and foremost to receive a favorable audience response and critical praise concerning the content, performances and subject matter embodied in the *Twiharder* motion picture, and then, if Plaintiff’s artistic contribution succeeds by exciting laughter and provoking thought for the benefit of the public marketplace, then whatever financial rewards that flow back to Plaintiff are reasonably viewed as being “just desserts” for a job well-done.

298. Relying, in part, on the sound holding articulated in Cardtoons v. Major League Baseball Player Ass’n, 868 F. Supp. 1266, 1268 (1994): “***It is reasonable that a parodist would seek compensation for his efforts, for though the parodist takes substantial inspiration from***

*his subject, he creates something that did not exist before.”*³⁵

D. NATURE OF COPYRIGHTED WORK

(1) A POPULAR CULTURE “PHENOMENON”

299. *Twilight Saga: New Moon* is a full-length feature “motion picture” work of fiction created, produced and marketed by Defendants.

300. Defendants’ motion picture *New Moon* was published prior to the making of Plaintiffs’ motion picture *Twiharder* and is well-known in the world of popular culture, having achieved substantial financial success in the global marketplace.

301. Because parodies simulate publicly known works to achieve their comic purpose, the second factor of the Fair Use defense set forth in Section 107 is rarely considered a dispositive factor in the Fair Use analysis.

(2) PROTECTABLE ELEMENTS

302. Defendants are the purported copyright owners of the motion picture entitled “*Twilight*”, bearing copyright registration number PA 1-616-599 (effective December 12, 2008) [Ex. B (BTL_000060)]

303. Defendants are the purported copyright owner of the motion picture entitled “*The Twilight Saga: New Moon*”, bearing copyright registration number PA 1-653-512 (effective November 24, 2009) [Ex. B (BTL_000064)]

304. Defendants are the purported copyright owner of the motion picture entitled “*The*

³⁵ Cardtoons v. Major League Baseball Player Ass’n, 868 F. Supp. 1266, 1268 (1994) (“Creating a successful commercial parody of a well-known person is not as simple as creating a successful commercial counterfeit of a well-known product. A counterfeiter adds nothing to the original. A parodist takes a person, exaggerates and distorts facets of the person until hilarity ensues, and markets the result. The result is not the equivalent of the original: the parodist has studied the original and modified it until it is something that could never be mistaken for its progenitor. It is reasonable that a parodist would seek compensation for his efforts, for though the parodist takes substantial inspiration from his subject, he creates something that did not exist before.”)

Twilight Saga: Eclipse”, bearing copyright registration number PA 1-689-175 (effective July 2, 2010) [Ex. B (BTL_000066)]

305. Plaintiff avers that with respect to the case at bar, the only protectable elements that Defendants own or can purport to own are the audio-visual wave samples and/or literary inscriptions that have been encoded in a tangible medium of expression and duly filed by Defendants with the U.S. Copyright Office.

(3) NON-COPYRIGHTABLE ELEMENTS

306. Defendants’ copyrighted motion pictures employ typical characters and stock themes such as vampires and werewolves. Indeed, during the twenty-five (25) years before the initial theatrical release of the Defendants’ *The Twilight Saga* movies in November 2008, Hollywood has consistently marketed and produced Vampire-related feature films to young U.S. consumers, many of which revolve around romantic fantasy and/or teenage angst. e.g., *The Hunger* (1983); *Lifeforce* (1985); *Fright Night* (1985); *Vamp* (1986); *The Lost Boys* (1987); *Near Dark* (1987); *Fright Night Part 2* (1988); *Vampire’s Kiss* (1989); *Subspecies* (1991); *Sundown: The Vampire in Retreat* (1991); *Buffy the Vampire Slayer* (1992); *Innocent Blood* (1992); *Bram Stoker’s Dracula* (1992); *Cronos* (1993); *Interview with the Vampire* (1994); *Nadja* (1994); *Blood and Donuts* (1995); *The Addiction* (1995); *From Dusk Till Dawn* (1996); *Blade* (1998); *John Carpenter’s Vampires* (1998); *Shadow of the Vampire* (2000); *The Foresaken* (2001); *Blade II* (2002); *Queen of the Damned* (2002); *Vampire Effect* (2003); *Underworld* (2003); *Night Watch* (2004); *Van Helsing* (2004); *Blade: Trinity* (2004); *Underworld: Evolution* (2006); *Frostbitten* (2006); *Day Watch* (2006).

307. Defendants’ copyrighted works do not afford protection with respect to isolated incidents depicted in its motion pictures or screenplays, particularly where they are stock incidents which naturally arise in common types of stories involving vampires, werewolves, and

teenage love triangles.

308. Defendants do not possess any proprietary interest in the themes, the locale, look, feel or setting of the narrative depicted in any of their copyrighted motion pictures.

309. The ideas on display in Defendants' work are not protected under any registered copyright (or at common law), apart from the identical manner and means in which such ideas are digitally fixated and transcribed into the U.S. copyright database.³⁶

310. Plaintiff – and any other member of society - may freely build off, modify, or recontextualize the ideas, themes, individual scenes and plot points that happen to be depicted in Defendant's motion picture.

E. SUBSTANTIALITY OF MATERIAL USED

(1) NO CONTENT SAMPLING

311. At all relevant times, Plaintiff has expressly labeled and described its *Twiharder* motion picture as a parody, and the work therefore imitates or virtually simulates some of the characters, themes, and plot points featured in Defendants' motion picture *New Moon*.³⁷

312. Plaintiff has not “copied,” replicated or “sampled” – digitally or otherwise - any protectable property of the Defendants in this action. Plaintiff has merely targeted *The Twilight Saga: New Moon*, and its highly visible teenage fan base, as objects of parody with the manifest intent to excite laughter in audiences.

313. *Twiharder* criticizes its intended target through a recognizable allusion to its

³⁶ “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 15 U.S.C § 102(b).

³⁷ *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc.*, 886 F.2d 490, 494 (2d Cir. 1989) (stating that the “keystone of parody is imitation” and noting that “[a] parody must convey two simultaneous--and contradictory-- messages: that it is the original, but also that it is not the original and is instead a parody. To the extent that it does only the former but not the latter, it is ... a poor parody”).

object through distorted imitation of the characters, events, and essence of the original.

(2) ORDINARY OBSERVER TEST

314. In creating *Twiharder* as a full-length motion picture, Plaintiff has “conjured up” material from *The Twilight Saga: New Moon* to the extent that Plaintiff has brought about the recalling or conjuring up of characters, themes and images of the targeted work as more than just a fleeting evocation of the original to make its humorous point.³⁸

315. *Twiharder* references characters, themes and plot points from Defendants’ work in order to trigger recognition of *New Moon* in the mind of the ordinary observer.

316. Plaintiff did not create *Twiharder* with the intent to pass off Defendants’ work as its own, but rather, with the specific intent to excite laughter in such ordinary observers by visually distorting elements from the targeted work for comedic effect.

317. *Twiharder*’s innovative form of expression and unique cinematic style is readily distinguishable from the expressive form and style on display in *New Moon* and therefore must be regarded in furtherance of its own creative purpose.³⁹

318. An ordinary observer who views *Twiharder* is immediately able to detect the actors depicted in *Twiharder* as caricatures of the actors featured in *New Moon* without any aid.

319. No ordinary observer could reasonably be deceived by Plaintiff’s parody film *Twiharder*.

320. No ordinary observer could be reasonably led to believe that *Twiharder* is a literal picturization of Defendant’s screenplay rights or adaptation of the book by Stephenie

³⁸ Elsmere Music, Inc. v. National Broadcasting Co., 623 F.2d 252, 253 n.1 (2d Cir. 1980) (in affirming the district court’s decision, Second Circuit noted “that the concept of ‘conjuring up’ an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. A parody is entitled at least to ‘conjure up’ the original.”).

³⁹ Berlin v. E.C. Publications, Inc., 329 F.2d 541, 545-46 (2d Cir.), cert. denied, 379 U.S. 822 (1964) (finding fair use where there existed “disparities in theme, content and style between the original” and work parodied)

Meyer upon which the Defendants' movie *The Twilight Saga: New Moon* is based.

321. The comedic nature of the Plaintiff's work parody dictates that the visually distorted caricatures featured in Plaintiff's motion picture *Twiharder* have, in many cases, entirely exaggerated motivations or the exact opposite motivations as the targeted protagonists featured in Defendant's motion picture.

322. In short, audiences are able to reasonably perceive the parodic character of the Plaintiff's new work *Twiharder*.

(3) INDEPENDENT CREATION

323. *Twiharder* was created and developed independently from the production of Defendant's "motion picture" *New Moon*.

324. Plaintiff's full-length motion picture *Twiharder* represents in its entirety the fruit of Plaintiff's own independent planning, execution and effort.⁴⁰

325. Plaintiff has created its own "motion picture" using independent means and methods of production, whilst employing its own artistic preferences as to key casting decisions, staffing, equipment selection, financial budgeting, location, ambience, lighting techniques, dynamic contrast, cinematography, camera angles, dialogue, plot sequence, scene duration, sound mixing, music synchronization, special effects, editing transitions, color fixation, tonal modulation, and animated titling.

326. There are a substantial number of completely original features in the newly created parodical work, including storylines, characters, scenes, plotlines, dialogue, musical compositions, scoring, lighting, "look and feel," and post-production editing transitions.

⁴⁰ Tin Pan Apple, Inc. v. Miller Brewing Co., 737 F. Supp. 826, 830 (S.D.N.Y. 1990)

F. EFFECT ON POTENTIAL MARKET

(1) NO MARKET DISPLACEMENT

327. Because the imitation displayed by the *Twiharder* “motion picture” peaks the public’s curiosity and serves as an advertisement for Defendants’ dramatic copyrighted work, it could not possibly harm the market of the original dramatic work.

328. Because *Twiharder* constitutes a transformative use under Section 107(1), it is not likely to supersede or displace the original *New Moon* motion picture upon which the parody was based.

329. *Twiharder* was never positioned to compete with *New Moon* in the first place. While *New Moon* was released in theaters on November 20, 2009 and appeared on home video on March 20, 2010, the *Twiharder* film was not scheduled to be released until October or November 2012, a full three years after the theatrical debut of *New Moon*.

330. Prior to Defendants’ unlawful interference with the distribution of Plaintiff’s “motion picture,” *Twiharder* was indeed scheduled to be released in conjunction with the theatrical release of *The Twilight Saga: Breaking Dawn 2*, however it is not possible that *Twiharder*, a comedic parody, could have served as a market replacement for the debut of *Breaking Dawn 2*.

331. As a comedic parody, *Twiharder* clearly serves a different market function than the teen fantasy / vampire romance series of motion pictures produced by Defendants under *The Twilight Saga* moniker.

332. The primary purpose of *Twiharder*, which is obviously of a comical nature, was not to directly compete with *Breaking Dawn 2* in an attempt to usurp the market for Defendants’ work. Rather, the *Twiharder* feature film was to serve as a dissenting viewpoint and critical commentary on the stock themes and stereotypical characters utilized in *New Moon*.

333. *Twiharder* therefore could not cause any market harm to *New Moon* or any other other *The Twilight Saga* films because although Plaintiff's work parody may serve to criticize Defendants' works, it cannot possibly usurp demand for the serious, dramatic work by imitating it through the comedic arts.

334. The ecstatic fan base of teenage girls and young adults who had flocked to see *The Twilight Saga* movies over the course of more than four years could not be reasonably expected to just stop attending Defendants' movies in order to view the Plaintiff's *Twiharder* parody.

(2) DE FACTO ENFORCEMENT OF "MORAL RIGHTS"

335. In the article *Playing in Someone Else's Sandbox: A Legal and Cultural Overview of Fanfiction*,⁴¹ Harvard Law student Erica George observes:

"In many cases where copyright holders request or demand that fanfiction writers stop their reuse, the core complaint seems to be less about the technicality of copyright infringements, and more about a desire to maintain control over the public image of a creation. In some countries, this concern is written into the law as "moral rights" that grant original creators the right to prevent others from distorting their works in ways that might tarnish the image and good name of the creator. US copyright law does not recognize a moral right to prevent distortion . . . *The implicit threat of a lawsuit on copyright grounds provides a de facto enforcement of otherwise unprotectable moral rights.*" (emphasis provided)

336. Plaintiff avers that the impetus, in part, for Defendants' unlawful, predatory conduct was less about economic impact or market displacement of *The Twilight Saga* films and more about Defendants' attempt to enforce "moral rights" (which it does not legally possess under U.S. Copyright law) by unilaterally suppressing the work parody created by Plaintiff as a way to "preserve" the "sanctity" of the underlying messages encoded in *The Twilight Saga* motion pictures.

⁴¹ Harvard Law Committee on Sports & Entertainment Law, BRIEFING BOOK: SIGNAL/NOISE 2k, p. 35. (April 8, 2005).

337. In support of its copyright infringement claims against Plaintiff, Defendants have stated in writing that “the intentionally sexual, vulgar, and tawdry nature of *the TWIHARDER film tarnishes the essential, intrinsic, and well-known wholesomeness of the Twilight Motion Pictures.*” [Ex. A (BTL_000034)] (emphasis added)

338. Defendants have further stated that “The TWIHARDER film includes nothing that transforms the *Twilight* Motion Pictures, given that it is a poor scene-by-scene retelling, nor does it shed any light, provide critical commentary, *or provide any other social value* justifying a fair use defense.” [Ex. A (BTL_000034)] (emphasis added)

339. Plaintiff avers that the rhetorical mode of comedic parody, particularly when directed at a popular movie franchise that holds itself out to the community as a model of “wholesomeness,” is necessary to balance out the perspective of younger audiences who tend to “max out” on their suspension of disbelief when adopting fantasy tales such as *The Twilight Saga* as a “way of life.”

COUNT II

VIOLATION OF DIGITAL MILLENNIUM COPYRIGHT ACT 17 U.S.C. § 512(f)

A. STATUTORY LANGUAGE

340. 17 U.S.C. § 512(f) of the DIGITAL MILLENNIUM COPYRIGHT ACT (“DMCA”) provides in relevant part:

Any person who knowingly materially misrepresents ... that material or activity is infringing ... shall be liable for any damages, including costs and attorneys’ fees, incurred by the alleged infringer ... 17 U.S.C. § 512(f).

341. The Congressional purpose of Section 512(f) of the DMCA is to penalize copyright holders for indiscriminately serving notices of copyright infringements and transmitting sham cease and desist letters to individuals or companies without good faith basis to assert such allegations, nor any intent to actually follow through with a lawsuit based on such allegations.

B. PLAINTIFF’S STANDING UNDER 17 U.S.C. § 512(f)

342. Beginning on at least June 27, 2012, and continuing through the present, Defendants have alleged that Plaintiff’s copyrighted feature-length “motion picture” entitled *Twiharder* infringes upon Defendants’ copyrighted works to the “motion pictures” *Twilight*, *The Twilight Saga: New Moon* and *The Twilight Saga: Eclipse*. [Ex. A (BTL_000004)]

343. As per section 512(c)(3)(iii) of the DMCA, the “cease and desist” letter transmitted by Defendants on June 27, 2012 clearly identified the copyrighted works claimed to have been infringed through the attachment of Defendants’ copyright registrations concerning

the films entitled *Twilight*, *The Twilight Saga: New Moon* and *The Twilight Saga: Eclipse*.⁴²
[Ex. A (BTL_00004)]

344. Defendants' allegations of copyright infringement were knowingly and materially false when made.

345. Defendants made such misrepresentations in order to unlawfully leverage their limited copyright monopoly in bad faith so as to unconditionally foreclose Plaintiff from enjoying the benefits of its own proprietary interests in valuable copyrights accorded to Plaintiff under federal law.

346. As a direct result of Defendants' knowingly material false allegations that Plaintiff's original, feature-length work parody infringed on Defendants' *The Twilight Saga* movies, Plaintiff has sustained economic injuries to its professional trade and business and has irrevocably suffered the loss of a valuable expectancy interest to enjoy the fruits of its labor for having independently created *TwiHarder* in furtherance of the useful Arts.

347. Based on the foregoing, Plaintiff has standing to assert a claim against Defendants pursuant to 17 U.S.C. § 512(f).

C. KNOWINGLY FALSE REPRESENTATIONS

348. Defendants violated § 512(f) of the DMCA by knowingly materially misrepresenting that Plaintiff's original motion picture *TwiHarder*, and its related audio-visual works available for viewing at www.TwiHarder.com infringed upon Defendants' purported copyright interests in the Defendants' *The Twilight Saga* motion pictures, thereby causing economic injury to Plaintiff, who was thereafter prohibited from distributing its full-length feature film to a market of consumers who stood in demand for innovative material that

⁴² 17 U.S.C. § 512(c)(3)(iii).

parodied *The Twilight Saga* motion pictures and tentpole franchise.

(1) FALSE DENIALS OF PARODY

349. During the course of Defendants' sham cease-and-desist campaign, beginning June 27, 2012 and continuing through the present, Defendants knowingly materially misrepresented that Plaintiff had infringed on Defendants' purported copyright interest(s) in one (or more) of its motion picture works by pretending that *TwiHarder* was a literal, dramatic re-make of one or more of *The Twilight Saga* movies.

350. At all times continuing through the present, Defendants have been in possession of actual knowledge that they were misrepresenting the material facts concerning the fundamental character and comedic nature of Plaintiff's work *TwiHarder*.

351. Defendants actually knew – because no reasonable person could conclude otherwise – that *TwiHarder* was a comedic spoof and work parody that targets Defendants' *The Twilight Saga*, aspects of its tentpole franchise, and an obsessive legion of fans known as TwiHards as the objects of artistic ridicule and sociopolitical commentary.

352. Like *Vampire Sucks* (2010) and *Breaking Wind* (2012), the two feature-length parodies brought to mass market by Defendants and/or their authorized rights holders, Defendants actually knew that *TwiHarder* was a feature-length motion picture of independent creation that upon first glance immediately conveys to audiences its transparent intent to spoof, mock, ridicule and lampoon *The Twilight Saga* movies.

353. Indeed, the very title of the film itself: *TwiHarder*, excites laughter in people who hear the title for the very first time and who know about *The Twilight Saga* movies and their obsessive teenage fans known as “TwiHards.” The title is funny to the ordinary citizen and immediately recognizable as a parody of *The Twilight Saga* tentpole franchise.

354. Defendants actually knew that Plaintiff had not sought to ridicule or challenge

Defendants' *Twilight Saga* movies simply as means for attacking some other unrelated object of criticism. Rather, Defendants actually knew at all times that the purpose and intent of Plaintiff's work was to target Defendants' motion picture, and the fan-crazed phenomenon surrounding *The Twilight Saga* tentpole franchise.

355. Defendants actually knew that the first factor of the Fair Use analysis, as codified in Section 107 of the Copyright Act of 1976, regarding "commercial speech" did not weigh against the Plaintiff's Fair Use defense to infringement because Plaintiff's parody was obviously NOT a commercial advertisement proposing another transaction for the sale of goods and services.

356. Defendants actually knew that the "for-profit" purpose (in part) of Plaintiff's intent to distribute its original work parody was irrelevant to the Fair Use analysis, as applied by Courts over the last 35 years, because Defendants ONLY cited cases that entailed commercial *advertisements* (such as 30-second commercial TV spots) or Lanham Act cases to support its position on commercial use under Section 107(2), rather than any cases involving artistic work parody embodied in a feature-length motion picture or literary work.

357. Defendants knew at all times that Plaintiff's "motion picture" constituted a comedic work parody that enjoyed full protection under the First Amendment of the U.S. Constitution, and that such work parody was outside the scope of Defendants' exclusive rights under Section 106 of the COPYRIGHT ACT of 1976 by virtue of the Fair Use doctrine, as codified in Section 107 of the statute.

358. Plaintiff avers that NO reasonable U.S. copyright holder (or any other ordinary citizen possessed of their mental faculties) could have possibly believed that Plaintiff's motion picture *Twiharder* – which is outrageously irreverent and zany on its face – constituted "wholesale copying" of Defendants' pre-existing motion pictures.

359. Defendants actually knew such misrepresentations were false when it caused to transmit its sham C&D Notices to Plaintiff alleging that Plaintiff’s copyrighted motion picture constituted an infringement of Defendants’ purported copyright interests to its own motion pictures. This actual knowledge may be shown, in part, by reference to the professional acumen and legal expertise of Defendants’ sophisticated and nationally recognized IP counsel, who must be reasonably presumed to know a feature-length parody when she sees it.⁴³

360. On April 18, 2013, Defendants finally conceded in writing that *Twiharder* was in fact a parody intended to be distributed to a separate, derivative market occupied by *Breaking Wind*. [See Ex. (A (BTL_000043)] (“Between the Lines Productions is trying, without authorization, to enter a market already occupied by an authorized derivative work of the *Twilight* films.”). In other words, Defendants admitted that Plaintiff was not attempting to enter the young adult fantasy market occupied by *The Twilight Saga*, which was marketed primarily to adolescent girls as an epic vampire-romance film.

(2) FALSE ACCUSATIONS OF “WHOLESALE COPYING”

361. In its initial sham C&D Notice, transmitted to Plaintiff on June 27, 2012, Defendants outright denied that Plaintiff’s *Twiharder* film was a parody or comedic spoof, and instead alleged that the film constituted outright plagiarism of *The Twilight Saga* motion pictures, as if Plaintiff was attempting to recreate Defendants’ dramatic fantasy film and pass it off to the public as the next installment of the multi-billion dollar tentpole franchise:

- ♦ “Twiharder copies key scenes from the *Twilight* Motion Pictures...Between the Lines Productions has also copied the key elements of the scripts of the copyrighted *Twilight* Motion Pictures and the *Twilight* Motion Pictures

⁴³ Arista Records, Inc. v. MP3 Board, Inc., No. 00 Civ. 4660, 2002 WL 1997918, at *14 (S.D.N.Y. Aug. 29, 2002); accord Rossi v. Motion Picture Ass'n of America, 391 F.3d 1000, 1004–05 (9th Cir.2004) (citations omitted) (“There must be a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner.”).

themselves. In fact, it appears that the entire movie is just a condensed version of the *Twilight* Motion Pictures.”) [See Ex. A (BTL_000005)]

362. Even after screening the *Twiharder* motion picture in December 2012 at the behest of Plaintiff’s IP counsel, Defendants inexplicably continued to knowingly materially misrepresent that the *Twiharder* motion picture constituted a “wholesale copyright infringement” that “copies the whole of Summit’s films,” pretending as if Defendants’ work amounted to photocopying / counterfeiting or outright plagiarism with intent to somehow re-dramatize Defendants’ fantasy motion pictures.

♦ “[O]ur viewing [of the *Twiharder* film] only serves to confirm that the *Twiharder* film commits wholesale ... copyright infringement [because] ... it uses...the same story line verbatim and dialogue, similar costumes, and character names and myriad scenic, visual and musical references to the films . . . The *Twiharder* film ... copies the whole of Summit’s films *Twilight* and *The Twilight Saga: New Moon*, not just a couple of scenes, as well as parts of *The Twilight Saga: Eclipse*”); [Ex. A (BTL_000033-34)]

363. Courts and legal commentators have defined “*wholesale copying*” as “exact duplicates of the original articles,” “photocopies,” “verbatim copying,” “copying of entire works.”⁴⁴ In other words, the term “wholesale copying” amounts to counterfeiting, bootlegging or pirating the copyright holders’ work, which is activity proscribed by criminal statutes.

364. Defendants’ patently false allegations of such criminal activity against Plaintiff is “beyond the pale” of even those vampires depicted in Defendants’ fantasy films and is not remotely implicated in this case. If Defendants cannot demonstrate “wholesale copying” before the Honorable Court (which is a practical impossibility given that *Twiharder* is 100%

⁴⁴ *Williams v. Wilkins Co. v. U.S.*, 487 F.2d 1345, 1366 (Ct. Cl. 1973) (“It is undisputed that the photocopies in issue here were exact duplicates of the original articles; they were intended to be substitutes for and they served the same purpose as the original articles.. This is the very essence of wholesale copying.”); Ronald B. Standler, *Fair Use: No Excuse for Wholesale Copyright Infringement in the USA*, p. 4 (“Wholesale copying usually refers to copying an entire chapter in a book, copying an entire article in a periodical, or copying an entire document or webpage...Wholesale copying also usually refers to verbatim copying, in which the copier added no original expression...Therefore, wholesale copying is (1) large scale, involving many copies, (2) copying of entire works, and (3) is verbatim copying.”) www.rbs2.com/unfair.pdf

independent creation), they should be held liable under this Count simply for making such a vexatious allegation amongst a multitude of other sham claims.

365. Finally, on April 18, 2013, after ten (10) months of alleging plagiarism, wholesale copying and/or counterfeiting (as if devoid of any modicum of basic faculties), Defendants finally conceded – in no uncertain terms - that *Twiharder* was in fact a parody motion picture intended for a “derivative” market. Defendants admitted that Plaintiff was seeking to compete with Defendants’ own *Twilight* parody entitled *Breaking Wind* : “Between the Lines Productions is trying, without authorization, to enter a market already occupied by an authorized derivative work of the *Twilight* films.”) [See Ex. A (BTL_000043)]

366. But in the same C&D Notice on April 18, 2013, Defendant reverted back to its old material misrepresentations - made with actual knowledge of their falsity - that Plaintiff’s motion picture *Twiharder* was just a fungible piece of counterfeit merchandise that photocopied content from Defendants’ works (the “*Twiharder* film borrows wholesale from the *Twilight* films”). [Ex A (BTL_000043)]

(3) INTENTIONAL DISTORTION OF LANHAM ACT

367. In order to affirmatively conceal Defendants’ lack of meritorious claims for copyright infringement, Defendants have purposefully conflated its allegations of copyright infringement with sham allegations of trademark infringement as part of its “cease-and-desist” campaign (“C&D Campaign”) vis-à-vis Plaintiff, knowing full well that the legal standards to prove an infringement claim and identity of protectable material to sustain such claims were governed by entirely separate federal statutes.

368. Defendants actually knew that it did not possess ANY cognizable copyright infringement claim against Plaintiff based on the nature of Plaintiff’s work parody. To compensate for this deficiency in the merits of any copyright infringement claim, Defendants

aggregated its claims under the general guise of “infringement.”

369. Thus, Defendants routinely alleged that Plaintiff’s traddress, logo, website domain and promotional materials for *Twiharder* constituted evidence of “copyright infringement” of Defendants’ copyrighted motion pictures. Such distortion of intellectual property claims are patently frivolous, particularly when asserted by a sophisticated IP counsel.⁴⁵

370. Defendants’ consolidation of copyright and trademark claims were orchestrated by Defendants to “stack the deck” against Plaintiff as an independent filmmaker and to manipulate the market at large by creating the false illusion of copyright infringement claims where no such claims could even remotely exist.

D. ABSENCE OF LITIGATION PRIVILEGE

371. Defendants cannot prove that the allegations set forth in their sham cease-and-desist campaign vis-à-vis Plaintiff were made in good faith contemplating an actual lawsuit.

372. Over the last 4-5 years, Defendants’ aggressive litigation tactics against largely independent fan site operators, documentary filmmakers, cosmetic companies, T-shirt companies, web domain owners have been well-documented in the public record.

373. Defendant SUMMIT is not a company that hesitates to file civil lawsuits against independent filmmakers, artists and fans. The public record strongly indicates that Defendant SUMMIT relishes the opportunity to take down ordinary citizens and small business operations.

374. Since receiving Defendants’ initial C&D Letter on June 27, 2012, and in spite of the sham allegations contained therein, Plaintiff has at all times continued to operate its website

⁴⁵ Morita v. Omni Publications International, Ltd., 741 F.Supp. 1107, 1114 (S.D.N.Y.1990) (“[t]he Copyright Act provides an adequate remedy” for claims involving the unauthorized use of copyrights. Accordingly, “[t]he Lanham Act should not be distorted to provide a remedy for a failed claim of copyright infringement.”)

domain at www.Twiharder.com, has continued to use its identical tradename, logo and tradedress, has continued to look for essential distribution outlets for the *Twiharder* motion picture (despite being shut out of the essential distribution facilities), and has continued to conduct its normal operations in absolute defiance of Defendants' threats to file suit for infringement.

375. Yet, despite Defendants' consistent threats to sue Plaintiff for copyright and trademark infringement for a period of time now spanning almost eleven (11) months, dating back to June 27, 2012, Plaintiff never filed any civil lawsuit.

376. Defendants never filed a lawsuit against Plaintiff because Defendants knew at all relevant times, as was their industry custom and practice, that the sham C&D Notice transmitted to Plaintiff on June 27, 2012, was sufficient to achieve the Defendants' desired effect of completely excluding Plaintiff and its original parody *Twiharder* motion picture from the essential WMPI distribution facilities required to disseminate the motion picture to the marketplace

377. Accordingly, Defendants may not claim the litigation privilege in defense of this Count because it is manifest that Defendants never possessed a true intention to file suit against Plaintiff.⁴⁶

E. CAUSATION / INJURY

378. Beginning on June 27, 2012, and continuing through the present filing date, Defendants' predatory conduct of knowingly materially misrepresenting, via aggressive and highly illogical C&D Notices, that Plaintiff's motion picture *Twiharder* was infringing

⁴⁶ Matsushita Electronics Corp. v. Loral Corp., 974 F.Supp. 345, 354–55 (S.D.N.Y.1997); Sade Shoe Co. v. Oschin & Snyder, 162 Cal.App.3d 1174, 1180, 209 Cal.Rptr. 124 (1984); Aronson v. Kinsella, 58 Cal.App.4th 254, 263–65, 68 Cal.Rptr.2d 305 (1997) .

Defendants' copyrights was the direct and/or proximate cause of economic injury to Plaintiff's proprietary and pecuniary interests because Defendants' sham C&D Notices directly resulted in the exclusion of Plaintiff's feature-length motion picture from the WMPI distribution chain.

379. At all relevant times, it was foreseeable to Defendants, based on (a) its status as a major billion-dollar movie studio in possession of a dominant market position; (b) Plaintiff's status as an independent filmmaker with no market position; and (c) industry custom and practice followed by E&O Insurers and WMPI distributors that the mere act of transmitting C&D Notices to Plaintiff would cause the effect of terminating ALL economic relations between Plaintiff on one hand, and E&O Insurers / WMPI Distributors on the other. These market purveyors represent the "gatekeepers" that enable Plaintiff to access and enter into the WMPI with the intent to distribute its *Twiharder* motion picture.

380. Defendants' false misrepresentations, as contained in Defendants' stream of C&D Notices, were material in that they directly foreclosed Plaintiff's highly valuable business opportunity to release its feature-length work parody to the U.S. marketplace in a *timely* and newsworthy manner, as well as to consumers located in extraterritorial markets, who stood ready in demand for artistic expression in the form of American parody, caricature and travesty to contravene and lend alternative perspectives to the sincere, dramatic expressions and morality-infused content disseminated by *The Twilight Saga* movie series.

381. Defendants' unlawful engagement in predatory market activity through the utilization of sham C&D Notices directly resulted in the absolute and irrevocable destruction of Plaintiff's economic relations with highly reputable E&O Insurers such as CHUBB, major digital distribution firms such as GRAVITAS, and packaged media distributors such as BREAKING GLASS.

382. Defendants' unlawful conduct also foreclosed any tangible opportunity for

Plaintiff to release its motion picture *Twiharder* to either the domestic and/or foreign box office, thereby resulting in an impenetrable barrier of entry to essential distribution facilities that are specifically intended for the dissemination of Plaintiff's valuable speech content.

383. As a direct and/or proximate cause of Defendants' knowingly material misrepresentations in violation of 17 U.S.C. § 512(f), Plaintiff has sustained economic injuries and loss business opportunity in an amount to be determined at trial, but no less than \$125 Million (\$125,000,000), plus costs, interest and a reasonable attorney's fee.

COUNT III

VIOLATION OF FEDERAL ANTITRUST LAWS **[SHERMAN ACT, 15 U.S.C. § 2; CLAYTON ACT, 15 U.S.C. §§ 15, 26]**

A. ANTITRUST LAWS

(1) STATUTORY LANGUAGE

384. Section 2 of the SHERMAN ANTI-TRUST ACT makes it unlawful for any person or entity to “monopolize, or attempt to monopolize, or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations”⁴⁷

385. Section 4 of the CLAYTON ANTITRUST ACT provides a private right of action to “any person injured in his business or property by reason of anything forbidden in the anti-trust laws.”

386. Section 16 of the CLAYTON ANTITRUST ACT also permits a private plaintiff to seek an injunction “against threatened loss or damage by a violation of the anti-trust laws” in order to prevent continuing violations of the antitrust laws.

387. A person who prevails in a private anti-trust action is entitled to recover “threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”

(2) CONGRESSIONAL PURPOSE

388. Through the passage of the SHERMAN ANTITRUST ACT of 1890 (the “*Magna Carta of Free Enterprise*”) and the CLAYTON ANTITRUST ACT of 1914, U.S. Congress sought to

⁴⁷ 15 U.S.C. § 2

protect consumers from the sort of concentrated economic power that tends to result in: (a) higher market prices; and (b) decreased consumer choice.

389. As formulated more than fifty years ago by the U.S. Supreme Court in Brown Shoe Co., Inc. v. United States, 370 U.S. 294 (1962), the overarching purpose of the federal antitrust laws is to protect competition and to provide an incentive for the People to create and distribute innovative offerings for the good of the public interest.

390. Section 2 of the SHERMAN ACT seeks broadly to prevent monopolistic behavior, limiting the conduct of firms that have achieved a dominant competitive position in a particular market.

391. Section 2 of the SHERMAN ACT also makes illegal a firm's refusal to deal with another firm if the dominant firm refuses for the purpose of trying to monopolize the market.

392. Both copyright law and antitrust laws share a common purpose: "to encourag[e] innovation, industry and competition."⁴⁸

B. INTERPLAY B/W ANTI-TRUST AND COPYRIGHT

(1) CONSTITUTIONAL CONCERNS

393. The COPYRIGHT ACT of 1976 grants to the copyright owner a limited monopoly through the exclusive rights to reproduce, adapt, publish, perform and display his copyrighted work.⁴⁹

394. According to the U.S. Supreme Court, "the primary object in conferring the [copyright] monopoly lie[s] in the general benefits derived by the public from the labors of

⁴⁸ Atari Games Corp. v. Nintendo of America, Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990) ("[A] patent owner may not take the property right granted by a patent and use it to extend his power in the marketplace improperly, i.e., beyond the limits of what Congress intended to give in the patent laws."

⁴⁹ 17 U.S.C. § 106

authors.”⁵⁰

395. “Thomas Jefferson...initially expressed great uncertainty as to whether the Constitution should authorize the grant of copyrights and patents at all, writing that ‘the benefit even of limited monopolies is too doubtful’ to warrant anything other than their ‘suppression.’”⁵¹

396. James Madison, chief architect of the Constitution, also believed that “[m]onopolies . . . are justly classed among the greatest nu[i]sances in Government.”⁵² But Madison argued that “in certain cases” such as copyright, monopolies should “be granted” (“with caution, and guarded with strictness against abuse”) to serve as “compensation for a benefit actually gained to the community . . . which the owner might otherwise withhold from public use.”⁵³

397. James Madison also proclaimed that monopolies should not undermine the rights of individual citizens to earn a living consistent with their personal calling:

[Man] has an equal property in the use of his faculties and free choice of the objects on which to employ them . . . That is not a just government, nor is property secure under it, where arbitrary decisions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations.⁵⁴

398. The Federal Antitrust laws remain the only check on Defendants’ abuse of its limited copyright monopoly through which Defendants have deprived Plaintiff’s constituent

⁵⁰ Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) (Chief Justice Hughes)

⁵¹ Letter from Thomas Jefferson to James Madison (July 31, 1788), in 13 Papers of Thomas Jefferson 440, 443 (J. Boyd ed. 1956), quoted in Golan vs. Holder, Attorney General, et al., 565 U.S. ____ (2012) (Breyer, J, dissenting)

⁵² Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14 Papers of Thomas Jefferson 16, 21 (J. Boyd ed. 1958), quoted in Golan vs. Holder, Attorney General, et al., 565 U.S. ____ (2012) (Breyer, J, dissenting)

⁵³ Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments. In J. Madison, Writings 756 (J. Rakove ed. 1999), quoted in Golan vs. Holder, Attorney General, et al., 565 U.S. ____ (2012) (Breyer, J, dissenting)

⁵⁴ THE FOUNDERS’ CONSTITUTION, Chap. 17, Doc. 23, James Madison, Property, 29 Mar. 1792, Papers 14:266-68

members, Gearries and Sean, of their constitutional rights to target Defendants' motion pictures for critical review and to produce original works of authorship designed to excite laughter and provoke thought in the People through freedom of artistic expression in their chosen occupation.

(2) LACK OF IMMUNITY FROM ANTITRUST LIABILITY

399. Defendants LIONSGATE and SUMMIT are not immune from federal antitrust liability by virtue of their status as copyright holders and may be held by the Honorable Court to violate the federal antitrust laws by “concerted or contractual behavior that threatens competition.”⁵⁵

400. The U.S. Supreme Court has “held many times that power gained through some natural advantage such as a patent, copyright, or business acumen can give rise to liability if ‘a seller exploits his dominant position in one market to expand his empire into the next.’”⁵⁶

401. According to the U.S. Supreme Court, a monopolist who acquires a dominant position in one market through its copyrights may violate § 2 of the SHERMAN ACT if the monopolist exploits that dominant position to enhance a monopoly in another market.⁵⁷

402. The U.S. Supreme Court’s statement that “exploit[ing][a] dominant position in

⁵⁵ Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1215 (9th Cir. 1997) (quoting Data General v. Grumman Systems Support, 36 F.3d 1147, 1185, n. 63 (1st Cir. 1994); see also United States v. Microsoft Corp., 253 F.3d 34, 63 (D.C. Cir. 2001) (“Intellectual property rights do not confer a privilege to violate the antitrust laws.”) (citing In re Indep. Serv. Org. Antitrust Litig., 203 F.3d 1322, 1325 (Fed. Cir. 2000); C.R. Bard, Inc. v M3 Systems, Inc., 157 F.3d 1340 (Fed. Cir. 1998).

⁵⁶ Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992), 504 U.S. 479, n. 29, 112 S.Ct. at 2089, n. 29, 112 S.Ct. at 2089 n. 29 (quoting Times- Picayune Publishing Co. v. United States, 345 U.S. 594, 611, 73 S.Ct. 872, 882, 97 L.Ed. 1277 (1953) and citing Northern Pacific R. Co. v. United States, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958); United States v. Paramount Pictures, Inc., 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948); Leitch Mfg. Co. v. Barber Co., 302 U.S. 458, 463, 58 S.Ct. 288, 290-91, 82 L.Ed. 371 (1938).

⁵⁷ Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 479, n. 29, 112 S.Ct. 2072, 2089, n. 29, 119 L.Ed.2d 265 (1992); United States vs. Microsoft, 253 F.3d 34, 63 (D.C. Cir. 2001) (“Microsoft’s primary copyright argument borders upon the frivolous. The company claims an absolute and unfettered right to use its intellectual property as it wishes: ‘If intellectual property rights have been lawfully acquired,’ it says, then ‘their subsequent exercise cannot give rise to antitrust liability.’ Appellant’s Opening Br. at 105. That is no more correct than the proposition that use of one’s personal property, such as a baseball bat, cannot give rise to tort liability.”)

one market to expand [the] empire into the next” is broad enough to cover monopoly leveraging under § 2 of the SHERMAN ACT.⁵⁸

C. ANTI-TRUST STANDING

(1) INJURY TO BUSINESS OR PROPERTY

403. At all relevant times since at least June 27, 2012, Defendants have intentionally instituted a trade blockade against Plaintiff with respect to the major distribution networks that stood ready, willing and able to distribute Plaintiff’s feature length parody film *TwiHarder* to U.S.-based consumers, as well as to extraterritorial mass markets.

404. Defendants have sought to impose this blanket prohibition on the marketing, sale and distribution of *TwiHarder* by any means necessary with respect to all market channels, including theatrical box office, packaged home media content, VOD and EST.

405. Without any rational business justification, Defendants have consistently refused to deal with Plaintiff, e.g., by agreeing to license its film for distribution to Defendants’ vast network, and have in lieu thereof, unlawfully interfered with and destroyed Plaintiff’s economic relations with third party distributors and E&O insurers.

406. Defendants have also aggressively demanded the physical destruction of Plaintiff’s vital artistic expression and original works of authorship, based entirely on sham C&D Notices that had no good faith basis in fact or at law.

407. Defendants have leveraged their superior bargaining position and acquisition of predominate market power in the teen fantasy / vampire romance genre of the global motion picture industry to shut Plaintiff out of the lawful operation of its own business and to deprive

⁵⁸ Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 479, n. 29, 112 S.Ct. 2072, 2089, n. 29, 119 L.Ed.2d 265 (1992).

Plaintiff of the fruits of its labor.

408. Plaintiff had sufficient intent and capabilities to enter the market for feature-length motion picture parodies through which Plaintiff possessed a tangible expectancy interest to earn substantial profits from licensing fees derived from worldwide distribution of its feature-length motion picture *Twiharder*.

(2) DIRECT CAUSATION

409. Defendants' antitrust violations, consisting of exclusionary conduct, refusals to deal and deprivation of essential facilities, purposefully excluded Plaintiff from any and all viable distribution markets through the transmission of sham C&D letters that interfered with Plaintiff's economic relations with E&O insurers and WMPI distributors.

410. Defendants' forbidden conduct was a material or substantial cause of injury to the Plaintiff's business or property, measured by economic loss for which recovery is now sought.

411. Plaintiff's economic loss "stems from a competition-reducing aspect or effect of the Defendants' behavior."⁵⁹

412. Defendants' unlawful monopolistic conduct has been the direct or proximate cause of Plaintiff's economic injury in an amount to be determined at trial, but not less than \$375 million.

413. Defendants' unlawful monopolistic conduct has also been the direct or proximate cause of Plaintiff's loss of First Amendment freedom to speak out against *The Twilight Saga* motion pictures in a *timely* manner, thereby causing irreparable antitrust injury to Plaintiff (and

⁵⁹ Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344 (1990).

its individual members John Andrews Gearries and Christopher Sean).⁶⁰

(3) INJURY OF THE TYPE THE ANTITRUST LAWS WERE INTENDED TO PREVENT

414. Plaintiff has clearly sustained an “injury of the type the anti-trust laws were intended to prevent and that flows from that which makes [D]efendant’s acts unlawful.”⁶¹

415. The marketplace of ideas can only be enriched by the First Amendment exercise of rights if alternative opinions concerning matters of public interest are freely exchanged and allowed to percolate through streams of marketplace distribution.

416. As a direct or proximate result of the Defendants’ anti-competitive conduct, the public marketplace has been deprived of additional dissenting viewpoints and intrinsic speech content as expressed through Plaintiff’s “motion picture” *Twiharder*, which specifically targets Defendants’ *Twilight Saga* movies and surrounding commercial franchise as an object of sociopolitical and cultural criticism.

417. Defendants’ anticompetitive conduct in freezing Plaintiff out of the market has not resulted in more vigorous competition in the field of feature length parody production & distribution, nor has such unlawful conduct resulted in lower prices for the teen fantasy motion pictures distributed by Defendants under *The Twilight Saga* moniker. To the contrary, Defendants’ conduct has had an adverse effect on competition by severely diminishing or eradicating competition in the “Z Market.”

418. No real economic incentive has been conferred upon Defendants to extend its statutory monopoly into the “Z Market” for work parody production & distribution because Defendants have already been rewarded with over \$3.3 billion in revenue from “A Market”

⁶⁰ Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690, 49 L.Ed.2d 547 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

⁶¹ Brunswick Corp v. Pueblo Bowl-O-Mat, Inc., 429 US 477, 489 (1977).

box-office receipts generated by *The Twilight Saga* theatrical releases.

419. As a result of Defendants' anti-competitive conduct, there has been extremely limited innovation in the theatrical "Z Market" for true parody since at least 2007 because Defendants continue to employ the identical two writer-directors (Friedberg/Seltzer) to deliver formulaic parodies of Defendants' world famous tentpole franchises, such as *The Twilight Saga* and *Hunger Games*.

420. While "officially sanctioned" comedy spoofs such as *Vampire Sucks* (2010) and *Breaking Wind* (2012) are marketed and/or distributed by Defendants and their enterprise associates to the mass marketplace, Defendants have unlawfully leveraged their market power in their field of original intent (i.e., young adult fantasy films) by purposefully suppressing all other voices from the adjacent field of feature length parody distribution, including Plaintiff in this action.

421. The public marketplace has suffered from the limited market choice in feature film parody, as evidenced in part by the wholly negative reviews given to Friedberg / Seltzer parody films, the output of which has been harshly and uniformly condemned in spite of the box office success generated by their films.

422. While Friedberg / Seltzer obviously have a constitutional right to make the movies they want to make upon authorization and/or commission of Defendants; what becomes evident in the current monopolization scenario is that there are NO other feature length parodies for moviegoers to see BUT FOR the Friedberg / Seltzer formulaic brand of juvenile parody that has dominated the cineplexes for more than half a decade.

423. Monopolization by Defendants has resulted in a complete exclusion of any other types of feature-length parody and exclusion of other modes of comedic arts that target serious dramatic works: satire, travesty, farce, mock heroic, mock epic or burlesque.

424. The millennial era of the branded “movie franchise,” coupled with mass media consolidation and unregulated foreign ownership of American content production have decimated the comedic voice of the independent parodist, whose work has always existed on the edge but now finds himself pushed off the ledge.

425. Plaintiff has not received any direct or indirect benefit, economic or otherwise, as a result of Defendants’ anti-competitive conduct.

(4) LACK OF REMOTENESS / QUANTIFIABLE DAMAGES

426. There is a significant connection between the Defendants’ anti-trust violations complained of herein and the economic injuries suffered by Plaintiff.

427. Plaintiff is a participant in the relevant general market of the Worldwide Motion Picture Industry, as well as a participant in the more specific relevant market of feature-length work parody production and distribution.

428. As of June 2012, Plaintiff possessed a tangible expectancy interest in earning substantial revenues from licensing fees generated by the worldwide distribution of its feature-length film *Twiharder*, which was scheduled to be released by WARNER BROTHERS digital distribution and BREAKING GLASS packaged home media in September, October or November of 2012, which was within the proximate time frame as Defendants’ theatrical release of the fifth installment of *The Twilight Saga* film *Breaking Dawn Part 2*. This was the timeframe in which the public stood to benefit most from the release of Plaintiff’s work parody.

429. As a result of Defendants’ monopoly leveraging and unlawful exclusionary conduct, amongst other antitrust violations alleged herein, Plaintiff’s tangible expectancy interest was purposefully destroyed.

430. Plaintiff sustained a reasonably quantifiable economic injury in an amount to be determined at trial, but which Plaintiff estimates to be no less than \$90 million under the

material terms of the licensing agreement with GRAVITAS.

431. Plaintiff's economic damages may be reasonably calculated through comparative accounting methodologies, such as through direct comparisons to the gross receipts and licensing fees earned by the feature-length motion pictures *Vampire Sucks* (2010) and *Breaking Wind* (2012), each of which functioned to mock and ridicule *The Twilight Saga* movie series.

432. Plaintiff's economic injuries may also be reasonably demonstrated through comparisons to the worldwide box office receipts and licensing fees earned by feature-length comedic horror spoofs such as *Scary Movie* (2000), *Scary Movie 2* (2001), *Scary Movie 3* (2003), *Scary Movie 4* (2006), *Scary Movie 5* (2013), *A Haunted House* (2013), *Dracula: Dead and Loving It* (1995); and/or feature-length teen fantasy spoofs such as *Dance Flick* (2009), *Meet the Spartans* (2008), *Disaster Movie* (2008), *Epic Movie* (2007), *Date Movie* (2006), *Not Another Teen Movie* (2001), *High School High* (1996).

433. Plaintiff is a direct victim of Defendants' anti-competitive conduct because Defendant has specifically targeted Plaintiff with sham C&D Notices and has directly interfered with Plaintiff's economic relations with WMPI distributors such as GRAVITAS and E&O Insurers such as CHUBB operating in the Worldwide Motion Picture Industry.

434. Defendants' exclusionary conduct was purposefully effectuated to "take down" Plaintiff's cinematic expression and send a powerful chill through the pipeline of the worldwide distribution marketplace.

435. Plaintiff is not an indirect purchaser of Defendants' goods or services but is a direct competitor in the production and distribution of comedic feature-length parodies.

436. As per Section 16 of the Clayton Act,⁶² Plaintiff has also been threatened with loss or injury by virtue of Defendants' *continuing* demands to "cease-and-desist" from

⁶² 15 U.S.C. § 26.

marketing and distributing its own original copyrighted works, as recently as April 13, 2013.
[Ex. A (BTL_000042)]

(5) “EFFICIENT ENFORCER”

437. In addition to the aforementioned factors, Plaintiff has antitrust standing in this litigation because it is prepared to act as an “efficient enforcer,” ready, willing and able to vindicate the public interest in antitrust enforcement against the Defendants, who have engaged in a longstanding pattern or practice of “taking down” valuable expressions of ideas and concepts relating to *The Twilight Saga* that posed no economic threat to Defendants’ proprietary interests.

438. Further, as illustrated by Plaintiff’s declaratory judgment cause of action to challenge the constitutionality of the codified version of the Fair Use doctrine, Plaintiff stands before the Honorable Court willing to advocate for the benefit of independent filmmakers and authors, and by extension for the benefit of American society at large, to reinstate the “ideas of 1789” as expounded by James Madison and Thomas Jefferson who sought to liberate the marketplace from copyright enterprise monopolists who leverage their statutory rights to consolidate rather than expand the free exchange of artistic, cultural and sociopolitical expression.

D. ELEMENTS OF SECTION 2 MONOPOLIZATION

(1) OVERVIEW

439. To prevail on a Monopolization claim under Section 2 of the SHERMAN ACT, Plaintiff must establish that Defendants: (1) possessed monopoly power in the relevant market;

and (2) willfully acquired or maintained that power.⁶³

440. Section 2 plaintiffs must also establish antitrust injury.⁶⁴

(2) MARKET POWER

441. Monopoly power is “the power to control prices or exclude competition.”⁶⁵

442. Section 2 monopoly claims under the SHERMAN ACT require a showing of monopoly power, commonly referred to as “market power.”

443. To demonstrate market power by circumstantial evidence, a plaintiff must: “(1) define the relevant market; (2) show that the defendant owns a dominant share of that market; and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run.”

E. RELEVANT ANTITRUST MARKETS

444. For purposes of the federal antitrust laws, the U.S. Supreme Court and Second Circuit define a relevant market as the “‘area of effective competition’ within which the defendant operates.”⁶⁶

445. The boundaries of a relevant market “may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity,

⁶³ Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 481, 112 S.Ct. 2072, 2089-90, 119 L.Ed.2d 265 (1992) (citing United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966)).

⁶⁴ Cost Management Services, Inc. v. Washington Natural Gas Co., 99 F.3d 937, 949 (9th Cir.1996).

⁶⁵ Grinnell, 384 U.S. at 571, 86 S.Ct. at 1704 (quoting United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956)).

⁶⁶ AD/SAT. Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216, 226 (2d Cir. 1999) (quoting Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327-28 (1961)); see also Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202 (9th Cir. 1997) (“The relevant market is the field in which meaningful competition is said to exist.”)

the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.”⁶⁷

446. A single brand could constitute a separate market.⁶⁸

447. The relevant market definition may be determined through the “commercial realities” faced by consumers.⁶⁹

448. The marketing/distribution of motion picture works is a form of copyright exploitation, which represents the activity of disseminating speech content in a persuasive manner. Such activity is directly parallel to conveying words and messages through literature. Accordingly, Plaintiff herein identifies five (5) separate relevant markets in the WMPI which are each defined by Plaintiff according to the traditional modes of literary discourse, namely:

- (i) narration (the “A Market”)
- (ii) exposition (the “B Market”)
- (iii) juxtaposition (the “JX Market”)
- (iv) description (the “Y Market”); and
- (v) argumentation (the “Z Market”).

449. Following on the next page is a reference table that provides an overview of some of the key elements of the five relevant anti-trust markets defined by Plaintiff:

⁶⁷ Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S.Ct. 1502, 1524, 8 L.Ed.2d 510 (1962).

⁶⁸ Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 482, 112 S.Ct. 2072, 2090, 119 L.Ed.2d 265 (1992).

⁶⁹ Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 482, 112 S.Ct. 2072, 2090, 119 L.Ed.2d 265 (1992).

ANTI-TRUST MARKETS
(Motion Picture Marketing & Distribution)

	<u>A</u> MARKET	<u>B</u> MARKET	<u>JX</u> MARKET	<u>Y</u> MARKET	<u>Z</u> MARKET
SOURCE	Primary	Secondary- <i>Dependent</i>	Derivative	Secondary- <i>Independent</i>	Counter- Primary
RHETORICAL MODE OF SPEECH	Narration	Exposition	Juxtaposition	Description	Argumentation Opposition, Alternative
AUTHORIAL PURPOSE	Tell, Induce, Lead, Influence Preach, Indoctrinate	Explain, Affirm, Clarify, Testify, Reinforce, Expand	Build Up, Breakdown, Compare, Contrast, Deconstruct, Exemplify	Inform, Report, Define, Comment, Analyze, Critique	Challenge, Provoke, Criticize, Ridicule, Imitate, Lampoon
EXPRESSIVE CONTENT	Fiction, Fantasy, Young Adult, Teen Fantasy, Teen Romance, Fantasy Romance, Epic / Myth, Coming-of-Age, Vampires, Werewolves, Paranormal Romance, Fantasy Adventure, Supernatural Thriller	“Official” Documentary, “Special Features,” “Behind the Scenes,” Cast Profiles, Biographies, Director’s Cut, Unrated Version, Interviews, Fan Sites, Fanzines, Music Videos, Advertisements, Promotions	Fan-Fiction, Mash-Ups, Versions, Adaptations, Cover, Remix, Redux, Pop Art, Collage, Decoupage, Montage, Assemblage, Abstraction, Re-composition, Modifications, Interpolations Sampling	News Releases, Press Reports, Movie Reviews, Commentary, Editorial, Scholarship, Treatises, Scientific Research, Religious Analysis, Extended Definition, Historical Abstract, Classroom Documentary	Parody, Spoof, Travesty, Satire, Pastiche, Mock-Heroic, Mock-Epic, Farce, Caricature, Slapstick, Sarcasm, Deadpan, Burlesque, Masquerade, Surreal, Burletta, Extravaganza
CONCERNING	ANY Subject Material	“A” Market Material	“A”/“B”/“Y” Market Material	“A”/“B”/“JX” or “Z” Market	“A”/“B”/“JX” or “Y” Market
AUTHORIAL PERSPECTIVE	Majority View	Concurring View	Concurring or Dissenting View	Abstaining, Concurring or Dissenting View	Dissenting View
BALANCE OF LEGAL INTERESTS	Statutory Monopoly (Single Copyright)	Enterprise Monopoly (Aggregate Copyrights)	Enterprise Monopoly <i>vs.</i> Free Speech / Fair Use	Freedom of Press / Fair Use	Free Speech / Fair Use <i>vs.</i> Enterprise Monopoly
MAIN DISTRIBUTION CHANNELS	Film (2D/3D) Home Media VOD EST PPV Broadcast	Home Media VOD EST PPV Broadcast	Web Print Broadcast Home Media	Web Print Broadcast	Film (2D/3D) Home Media VOD EST PPV Broadcast
GEOGRAPHY	Worldwide	Worldwide	Worldwide	Worldwide	Worldwide

(1) “A MARKET” (NARRATION)

450. Plaintiff identifies the “A Market” as a *primary* source market in which Defendants operate to market and distribute their feature-length motion pictures under the “*The Twilight Saga*,” which is the mark (i.e., “Series Title”) Defendants use in actual commerce to identify the source of their tentpole franchise.

451. The “A Market” corresponds with the traditional literary Mode of Discourse known as narration. Narration conveys speech content through a story, which includes an introduction, plot, characters, setting, climax and conclusion. A narrative also includes a moral or morals.

452. It is within this relevant “A Market” in which Defendants seek to tell their story (or narrative) through the marketing, distribution and sale of feature-length motion pictures using the Series Title *The Twilight Saga*.

453. The “A Market” represents the copyright author’s market of *original intent*.

454. The geographic expanse or area within which customers can purchase or access the products offered by Defendants in the “A Market” is worldwide. Through its anticompetitive conduct, Defendants are capable of controlling the distribution pipeline of original motion pictures to a worldwide audience consisting of over 1 billion households.

455. The products marketed by Defendants in the “A Market” include the separate and divisible motion picture works entitled *Twilight* (2008); *The Twilight Saga: New Moon* (2009); *The Twilight Saga: Eclipse* (2010); *The Twilight Saga: Breaking Dawn Part 1* (2011); and *The Twilight Saga: Breaking Dawn Part 2* (2012) (collectively known herein as the “A Market Products”).

456. Defendants’ “A Market Products” are made available to and identified by the general public using the Series Title “*The Twilight Saga*.”

457. Defendants distribute their “A Market Products” to the public through various channels of media distribution known as “transcription formats”, including: (a) theatrical release format; (b) packaged media format (i.e. DVD and Blu-Ray Discs); (c) video-on-demand (“VOD”) format (i.e., cable television or internet streaming); (d) electronic sell-through (“EST”) format (i.e., whereby consumers pay a one-time fee to download a media file for storage on a hard drive); and (e) broadcast rights (i.e., “Big Four” network commercial television).⁷⁰

458. The theatrical release transcription format generates revenues for “A Market Products” through box-office receipts collected at domestic and foreign movie theaters.

459. The home video transcription format generates revenues for “A Market Products” through sales of “hard copy” products such as DVD and Blu-Ray discs, either on-line or at brick-and-mortar retail outlets.

460. The VOD transcription format generates revenues for “A Market Products” through cable television or internet subscription fees.

461. The EST transcription format generates revenues for “A Market Products” through one-time user fees captured by, e.g., Apple’s iTunes Store, Amazon Instant Video or Wal-Mart VUDU.

462. The broadcast transcription format generates revenues from licensing to television broadcasters (e.g., CBS, NBC, ABC, FOX).

463. Defendants’ “A Market Products” are targeted to consumers of specific genres (and subgenres) of cinematic and literary storytelling widely known by the following category

⁷⁰ See Ex E. (BTL_000309) (quoting LIONSGATE’s CEO: “We look at all facets of our home entertainment business as an integrated whole - packaged media, on demand and digital. . . . Industry wide, packaged media is stabilizing, VOD continues to grow and electronic sell through . . . is finally beginning to take off.”).

names, which more or less fall within the doctrine of equivalents⁷¹: “teen fantasy,” “teen fantasy romance,”⁷² “teen fantasy adventure,”⁷³ “young adult fantasy,” “young adult romance,” “teen vampire,” “teen vampire romance,” “vampire romance,” “paranormal romance,” “vampire movies,” “epic/myth,” and “coming-of-age”.

464. “Teen Fantasy” motion pictures that have gained popularity during the last decade include the *Harry Potter* series, the *Hunger Games* series, and *The Chronicles of Narnia* series, all of which are based on popular books targeted to pre-teenagers and young adults.

465. The “A Market” defined herein consists of feature-length motion pictures that are fictional and fantastical in nature, that cater to the active imaginations of young adults, and that have reasonable interchangeability with other “teen fantasy” films produced for the young adult audience, as well as for those members of the adult population who live vicariously through the youthful endeavors of the characters depicted in such plays.

466. Substitutes for Defendants “A Market” goods may include movie brands such as the *Harry Potter* series, the *Hunger Games* series (also produced and distributed by Defendant LIONSGATE), and *The Chronicles of Narnia* series. Such “teen fantasy” series, which have wide market appeal, can be substituted for the same purpose of entertainment or for providing an outlet for the imagination of young adults.

467. As such, “teen fantasy” films which are presented to consumers as fantasy films featuring young adults or children confronted with dramatic scenarios are reasonably interchangeable for purposes of defining and being included within a single product market –

⁷¹ The primary distinguishing factor appears to be along the lines of male-targeted fantasy vs. female-targeted fantasy.

⁷² At BarnesandNoble.com, a keyword search using “Teen Fantasy Romance” yields 3195 results.

⁷³ At BarnesandNoble.com, a keyword search using “Teen Fantasy Adventure” yields 6427 results.

the “A Market.”

468. With respect to the “A Market Products” at issue in this case, the demographic market (i.e., distribution target) for Defendants’ “A Market Products” consists largely of (a) female pre-adolescents, young adults, teenagers; and (b) female adults seeking to recapture the magic of their youth. The fact that the story in *The Twilight Saga* series is narrated from the first person perspective of the lead female character has created a fanbase that consists of disproportionate amount of female moviegoers for Defendants’ motion pictures.⁷⁴

469. Consumers within the targeted demographic market use “A Market Products” for entertainment purposes.

470. The U.S. federal government grants Defendants’ a virtual monopoly to exploit its “A Market Products” through registration of Defendants’ respective copyrights in the cinematographic material and underlying literary screenplays upon which Defendants’ “A Market Products” are based.

(2) “B MARKET” (EXPOSITION)

471. Plaintiff identifies the “B Market” as a *secondary* source or “downstream” market in which Defendants operate to market and distribute motion pictures and other copyrighted audio-visual, photographic and literary works, mostly originated or licensed by Defendants, that seek to explain, affirm, define, investigate, testify to or reinforce the primary narrative speech content set forth in Defendants’ “A Market Products.”

472. The “B Market” corresponds with the traditional literary Mode of Discourse

⁷⁴ See Ex. E (BTL_000283) (describing Twilight fanbase in 2008 as “screaming adolescent girls and TwiMoms” and quoting David C. Friedman, then executive vice-president and general counsel at SUMMIT: “We saw Twilight was a very popular property among female teenagers and older women as well, with this whole TwiMom thing.”); see also Ex. O (BTL_000733) (“Meyer inspires a primarily female audience.”); Ex. O (BTL_000741) (“the series is particularly popular among tween and teen girls”); Ex. O (BTL_000758) (“there’s an on-line community of TwilightMoms.com, devoted to middle-age women fans.”)

known as exposition. Exposition conveys speech content through explaining, evaluating, or expounding on a principal idea or storyline. It is within this relevant “B Market” in which Defendants seek to reinforce the principal ideas and concepts exhibited in the “A Market Products” through the marketing, distribution and sale of documentary or biographical films and short films, such as special features, behind-the-scenes, cast profiles, biographies, interviews, fan profiles, music videos and other promotional fare.

473. The geographic expanse or area within which customers can purchase or access the products offered by Defendants in the “B Market” is worldwide. Through its anticompetitive conduct, Defendants are capable of controlling the distribution of “motion pictures” to the worldwide audience.

474. The products marketed by Defendants in the “B Market” include the separate and divisible motion pictures entitled *Twilight in Forks: Saga of the Real Town* (2010); *Destination Forks: The Real World of Twilight* (2010); *Twilight: The Robert Pattinson and Taylor Lautner Saga* (2012); *Twilight: Broken Hearts* (2012); *Twilight in Volterra* (2013); *Twilight: Alpha Males* (2012); *Music Videos and Performances from The Twilight Saga* (2010) (collectively known herein as the “B Market Products”). The B Market Products are NOT feature-length films as per the SAG definition of that term.

475. Upon information and belief, Defendants “B Market Products” sample footage and outtakes from the copyrighted “A Market Products.”

476. “B Market Products” are made available to the general public via sale.

477. Defendants distribute their “B Market Products” to the public through various channels of distribution including (a) packaged home media format; (b) VOD transcription format; and (c) EST transcription format.

478. The packaged home media transcription format for “B Market Products”

generates revenues through sales of “hard copy” products such as DVD and Blu-Ray, either on-line or at brick-and-mortar retail outlets.

479. The VOD transcription format for “B Market Products” generates revenues through licensing fees and/or subscription fees collected from on-line sites such as iTunes, Netflix and Amazon.com.

480. The EST transcription format generates revenues for “B Market Products” through one-time user fees captured by, e.g., Apple’s iTunes Store, Amazon Instant Video or Wal-Mart VUDU.

481. Defendants’ “B Market Products” are targeted to the same class of consumers as the “A Market” Products.

482. The demographic market (i.e., distribution target) for Defendants’ “B Market Products” consists largely of the identical demographic market for Defendants’ “A Market Products.”

483. Consumers within the demographic market use “B Market Products” for entertainment and for informative purposes.

484. The U.S. federal government grants Defendants’ a monopoly to exploit the “B Market Products” through registration of Defendants’ respective copyrights in the speech content exhibited in the “B Market Products.”

(3) “JX MARKET” (JUXTAPOSITION)

485. Plaintiff identifies the “JX Market” as a *derivative* source market in which third parties operate to market and distribute audio-visual, photographic and literary works originated by third parties that seek to elaborate upon or deconstruct Defendants’ “A Market Products” or “B Market Products” (and generally without Defendants’ express authorization or sponsorship).

486. The “JX Market” corresponds with the traditional literary Modes of Discourse

known as juxtaposition, exemplification and/or extended definition. These modes convey speech content through “sampling” a pre-existing work to create a new proposition. By appropriating and re-contextualizing elements or materials exhibited in Defendants pre-existing work, a third party introduces a novel idea or proposition based upon the pre-existing work through building upon the original work, breaking it down or comparing / contrasting the principal idea or storyline to a novel proposition.

487. Examples of works that populate the “JX Market” include fan-fiction, versions, virtual adaptations, animations, covers, remixes, redux, pop art, collage, decoupage, montage, assemblage, abstract compositions, mash-ups, and other alternative tangible fixations that incorporate samples from the actual material on display in Defendants “A Market” or “B Market Products.”

488. The “JX Market” is a derivative market in which authors of novel ideas generally produce works in order to comment upon, reinforce or criticize the Defendants’ “A Market” or “B Market” offerings.

489. The geographic expanse of the “JX Market” is worldwide.

490. Defendants do not produce products for the JX Market but instead attempt to commercially regulate this relevant market on the strength of its copyright monopoly by threatening JX Market producers with copyright infringement lawsuits.

491. Because “JX Market” works actually sample audio-visual, photographic, or literary material from Defendants’ A/B Market Products, they are presumptively infringing uses unless deemed by the Courts to constitute “fair use” under Section 107 of the Copyright Act of 1976.

492. “JX Market” works are generally distributed by third parties via the video-sharing sites YouTube and Vimeo and are rarely sold to the general public.

493. The demographic market (i.e., distribution target) for JX Market works is broader than the demographic market for A/B Market Products because the JX Market includes the A/B Market demographic, but may also include other demographics who would not be interested in purchasing A/B Market Products and who are attracted to JX Market works due to their critique of Defendants' "A/B Market Products."

494. Consumers within the demographic market use "JX Market Products" for entertainment and for informative purposes.

495. The U.S. federal government grants Defendants' a *limited* monopoly to exploit works in the "JX Market" by virtue of Section 106(2), which grants copyright holders the exclusive right to prepare derivative works. However, some JX Market works may be deemed "fair use" under Section 107 of the COPYRIGHT ACT OF 1976.

(4) "Y MARKET" (DESCRIPTION)

496. Plaintiff identifies the "Y Market" as a *secondary* source market in which third parties operate to market and distribute audio-visual, photographic and literary works originated by third parties that seek to describe, report, analyze or critique Defendants' "A/B Market Products," generally without Defendants' express authorization or sponsorship.

497. The "Y Market" corresponds with the traditional literary Mode of Discourse known as description. This mode conveys speech content through "news reporting" and can be summarized as the relevant market occupied by the Press or Academic Scholarship.

498. "Y Market" works incorporate elements from Defendants' A/B Market Products, but only for the informative purpose of describing or commenting upon the quality of such products relative to other newsworthy items.

499. Examples of commercial products that populate the "Y Market" include entertainment talk shows, entertainment news shows, news releases, literary press reports,

audio-visual or literary movie reviews, and academic essays.

500. The geographic expanse of the “Y Market” is worldwide.

501. The “Y Market” is a derivative, secondary source market that is generally permitted to operate “objectively” and without the interference of Defendants by virtue of the “fair use” doctrine at common law and in further accordance with Section 107 of the Copyright Act of 1976.

502. Defendants do not produce products for the “Y Market” but instead attempt to influence and/or control the viewpoints expressed within this relevant market to increase its sales revenues for its product offerings in the A/B Market.

503. Because “Y Market” products actually “sample” audio-visual, photographic, or literary material from Defendants’ A/B Market Products, “Y Market Products” are technically infringing uses unless deemed by the Courts to constitute “fair use” under Section 107 of the Copyright Act of 1976. However, because the Y Market can be utilized in furtherance of Defendants’ efforts to sell its A/B Market Products, the purveyors of Y Market Products (i.e., the Press) enjoy a presumption of non-infringement as a matter of industry custom and practice.

504. “Y Market Products” are generally distributed by third parties via television newscasts, magazines, newspapers and on-line webcasts.

505. The demographic market (i.e., distribution target) for Y Market Products is broader than the demographic market for A/B Market Products because the Y Market includes the A/B Market demographic, but may also include other demographics who may not be interested in purchasing A/B Market Products but may be influenced to do so after consuming Y Market Products that endorse or provide favorable reviews of Defendants’ A/B Market Products.

506. Consumers within the demographic market use “Y Market Products” for

entertainment and for informative purposes.

(5) “Z MARKET” (ARGUMENTATION)

507. Plaintiff identifies the “Z Market” as a *primary* source market in which Plaintiff operates to create, market and distribute audio-visual, photographic and literary works originated by Plaintiff that seek to parody, mock, ridicule, satirize, criticize and/or lampoon Defendants’ “A/B Market Products” without Defendants’ express authorization or sponsorship.

508. The “Z Market” corresponds with the traditional literary Mode of Discourse known as argumentation. This mode conveys speech content through studying the ideas set forth in Defendants A/B Market Products and then advancing a novel proposition that runs counter to the ideas expounded in such products.

509. It is within this relevant “Z Market” in which Plaintiff seeks to refute Defendants’ story as marketed, distributed and sold via Defendants’ full-length “motion pictures” entitled *Twilight* or *The Twilight Saga*.

510. The geographic expanse of the “Z Market” is worldwide.

511. The products marketed by Plaintiff in the “Z Market” include the feature-length “motion picture” *Twiharder* and its prospective feature-length sequel *Twiharder, Way Harder* (collectively referred to herein as the “Z Market Products”).

512. “Z Market Products” are made available to the public.

513. Plaintiff seeks to market and distribute their “Z Market Products” to the public through various channels of distribution including: (a) theatrical release transcription format; (b) home video release transcription format; and (c) electronic VOD transcription format.

514. Like “A Market Products,” the theatrical release transcription format generates revenues for “Z Market Products” through box-office receipts collected at domestic and foreign movie theaters.

515. Like “A Market Products,” the home video transcription format generates revenues for “Z Market Products” through sales of “hard copy” products such as DVD and Blu-Ray discs, either on-line or at brick-and-mortar retail outlets.

516. Like “A Market Products,” the electronic VOD transcription format generates revenues for “Z Market Products” through licensing fees and/or subscription fees collected from on-line sites such as iTunes, Netflix and Amazon.com.

517. Defendants’ “Z Market Products” are targeted to consumers of specific genres (and subgenres) of comedic storytelling widely known by the following category names: “comedy – spoof,” “parody/spoof,” “mockumentary,” “teen spoof,” “zany comedy”.

518. The Scriptlab.com defines “Parody/Spoof” as one of eight (8) subgenres of comedy films, describing a “Parody/Spoof” as “a sub-genre of Comedy film that bases itself in reality. These films impersonate, ridicule, or scoff at serious situations and people. These films rely heavily on satire and can be used as a means of social or political commentary. Parody/Spoof films can also take the form in a fake documentary called a “Mockumentary.”

519. “Comedy - Spoof” motion pictures that have achieved market popularity during the last twenty years include the *Scary Movie* series, the *Austin Power* series and the *Naked Gun* series. [See Ex. H; BTL_000373]

520. The “Z Market” consists of feature-length motion pictures that are fictional and comedic in nature, that cater to the humorous, counter-cultural, anti-authoritative and socio-political sensibilities of consumers, and that have reasonable interchangeability with other “Comedy - Spoof” films produced for audiences who enjoy zany, bizarre, physical, surreal, dark and/or ironic comedy.

521. Reasonable substitutes for Defendants’ “Z Market Products” may include movie parodies such as *Vampire Sucks* (2010), *Breaking Wind* (2012), *Date Movie* (2006), the *Scary*

Movie series (2000-2013) and *Not Another Teen Movie* (2001), to name a select few.

522. Such “Comedy – Spoofs,” each of which is entirely unique and subject to the context and *timing* of when they are initially exhibited / published, can be reasonably substituted for the same purpose of exciting laughter in audiences and/or provoking critical thought about the objects, themes and characters being parodied. As such, “Comedy – Spoof” films which are presented to consumers as comedy - spoof are reasonably interchangeable for purposes of defining and being included within a single product market – the “Z Market.”

523. With respect to the “Z Market Products” at issue in this case, the demographic market (i.e., distribution target) for Defendants’ “Z Market Products” consists largely of (a) *male* pre-adolescents, young adults, teenagers; and (b) male adults who enjoy spoofs and sophomoric comedies; (c) female pre-adolescents, young adults, teenagers who are themselves critical of the themes expounded by *The Twilight Saga* movies; (d) some members of the “A Market Product” demographic who are capable of laughing at that which they otherwise take seriously.

524. Consumers within the demographic market use “Z Market Products” for entertainment and for informative purposes.

525. The “Z Market” is a relevant market *adjacent* to the “A Market” because “A Market Products” do not fulfill the market need for “Z Market Products.”

526. As an adjacent market to the “A Market,” the “Z Market” entails new customers.

527. Plaintiff avers that, by virtue of Section 107 of the COPYRIGHT ACT of 1976, Defendants do NOT possess a legal monopoly granted by the U.S. federal government to create or exploit “Z Market Products” by virtue of merely registering their respective “A Market Products” as copyrighted “motion pictures,” nor through registering the underlying screenplays upon which Defendants’ “A Market Products” are based.

528. The commercial reality faced by the “Z Market” parodist, such as Plaintiff here, is that it must be able to reference through imitation the “A Market” copyrighted work targeted for criticism. Put another way, without express, imitative reference to the object of criticism identified in the “A Market”, there can be no “Z Market” parody.

529. The commercial reality of the public consumers who demand “Z Market Products” is that the value of “Z Market Products” achieves its maximum level where the “Z Market” producer is able to excite tremendous laughter and provoke critical thought via realistic, albeit distorted, imitations of elements from dramatic motion pictures existing in the “A Market.”

530. The relevant market producers for feature-length parody motion pictures are composed of Z Market producers, i.e., those authors, filmmakers, movie studios and copyright owners who write, finance, produce, direct, market and distribute comedic spoofs of dramatic “motion pictures.”

531. In the case at bar, Defendants have purposefully excluded Plaintiff – a “Z Market” producer – from the “Z Market” in which Plaintiff operates or attempts to operate, thereby positioning Defendants as the sole and exclusive producers and distributors of both: (a) “A Market Products,” i.e., the series of dramatic works entitled *The Twilight Saga*; and (b) “Z Market Products,” e.g., the feature-length comedic parody entitled *Breaking Wind* (2012).

532. Defendants are engaged in a “dual monopoly” or “enterprise monopoly” of its registered copyrights that extends beyond the statutory grant of rights intended by Congress.

533. Defendants have purposefully excluded Plaintiff from entering the “Z Market.”

534. Upon information and belief, Defendant SUMMIT also authorized, licensed and/or supervised the production and distribution of the “Z Market” comedic parody *Vampire Sucks* (2010), which has generated over \$96 million in gross receipts.

535. Accordingly, the production of both the “A Market” dramatic motion picture

series entitled *The Twilight Saga* and the “Z Market” production of the feature-length comedic spoofs that criticized such series, *Breaking Wind* (2012) and *Vampire Sucks* (2010), were at all relevant times unified under the dominion of one common enterprise controlled by one copyright monopolist – the Defendants.

536. Under these circumstances, the Defendants achieved market power vis-à-vis its dealings with both independent “Z Market” producers of parodical work – such as Plaintiff - and public consumers from both the “A” and “Z Market” who demanded to see such work parody exhibited in theaters, on packaged home video, via VOD or EST.

537. Although Defendants have expounded upon stock Hollywood themes and typical characters throughout *The Twilight Saga* movies, the expression of those generic themes in the Defendants’ “A Market” copyrighted works and the enthusiastic “A Market” response to the young actors featured in Defendants’ copyrighted works (i.e., Pattinson, Stewart and Lautner), are unique to Defendants’ “A Market” copyrighted works and therefore NOT readily interchangeable with other teen fantasy or vampire romance movies.⁷⁵

538. In the relevant “Z Market” for comedic spoofs of *The Twilight Saga* movies, the commercial reality is that the “Z Market” parodist must draw upon the elements from *The Twilight Saga* movies to achieve its comedic effect and critical purpose.

539. Indeed, as *The Twilight Saga* movies became more ubiquitous during its four-year run from November 2008 through November 2012, the themes, elements and morals promoted in such movies, and the “pop culture phenomenon” surrounding their exploitation, became less interchangeable.

⁷⁵ For example, *The Lost Boys* is a classic teen fantasy / vampire romance movie from the 1990s that achieved widespread market success based on the success of its young stars Corey Haim (deceased) and Corey Feldman. But if the imitative references on display in *Twiharder* were limited to mocking *The Lost Boys*, a large share of the young audience in 2013 would be unlikely to “get the joke” considering that such audience members weren’t born when *The Lost Boys* was released. Comedy is all a matter of timing and context, and so then is parody.

540. As Defendants' brand of "teen vampire romance" movies became more famous, thereby affecting the attitudes and perceptions of the young populace, the "Z Market" parodist such as Plaintiff has no choice but to imitate Defendants' "A Market Products" because there exist no other "A Market" Products in the "teen fantasy" genre that could be parodied to achieve the maximum level of hilarity demanded by "Z Market" consumers.

541. Through Defendants' anticompetitive conduct, which spans from the "A" to "Z" distribution markets for feature-length motion pictures, Defendants ensured that they would not only possess the elements exhibited in its own "A Market" dramatic copyrighted works, but that they would also possess and control *any* imitative references produced and embodied in "Z Market" copyrighted works.

542. In doing so, Defendants' anticompetitive conduct has deprived Plaintiff of its trade and business as a valued producer in the "Z Market" and, more importantly, has deprived the consumer marketplace of vigorous competition to produce the best and most rewarding "Z Market Products" that excite laughter and provoke critical thought with regards to the ideological or thematic propositions expounded in Defendants' "A/B Market Products."

F. MARKET SHARE

(1) "A MARKET" SHARE

543. Defendants have a statutory monopoly in the "A Market" for its "A Market Products" by virtue of the U.S. copyright registrations embodying the five *The Twilight Saga* films.

544. As evidenced by the home video channel of distribution, Defendants have also garnered an extremely aggressive share of the market for "Teen Vampire Romance" movies. By way of illustration, at the website of BARNES AND NOBLE, a keyword search of "Teen Vampire

Romance” yields 691 results when searching “all products.”⁷⁶ Of the 691 results generated under “Teen Vampire Romance” at BARNES AND NOBLE’S website, 28 items are in the form of audio-visual products (i.e., “Movies & TV”). Twenty-three (23) out of the 28 audio-visual products categorized as “Teen Vampire Romance” on the BARNES AND NOBLE website are distributed and marketed by Defendants under the tradename “*Twilight*” or “*Twilight Saga*.” Therefore, according to the BARNES AND NOBLE website, Defendants command an 82% current market share of the DVD and Blu-Ray format for “Teen Vampire Romance” films.

(2) “Z MARKET” SHARE

545. At all times relevant to this action, Defendants have owned a dominant share of the “Z Market.”

546. Defendants’ dominant influence and power in the “Z Market” is shown by their January 2012 theatrical release of the feature-length comedic spoof “*Breaking Wind*,” which is a parody of Defendants’ film *The Twilight Saga: Breaking Dawn Part 1* (2011).

547. Indeed, since the theatrical release of *Vampires Suck* in August 2010, and with the noted exception of *Breaking Wind*, NO other comedic parody of *The Twilight Saga* films has been released to theaters or directly to the distribution channels of VOD or EST.

548. Therefore, because of Defendants’ anticompetitive conduct, consumers of “Z Market Products” have been deprived of the reasonable ability to choose between different “Z Market Products” which parody Defendants “A/B Market Products.”

549. Defendants’ dominant market share of the “Z Market” has manifested in trade restrictions on the output of “Z Market Products,” which limits consumer choice and also results in price increases for consumers seeking “Z Market Products.”

⁷⁶ <http://www.barnesandnoble.com/s/teen-vampire-romance?csrftoken=asSM9cnbF7M0E6TShAgELXKVyXqtR4N4&dref=1&keyword=teen+vampire+romance&sort=R> [as of April 27, 2013]

550. Since the release date of *The Twilight Saga: Breaking Dawn Part 1* on or about November 16, 2011, and Defendant LIONSGATE's official acquisition of Defendant SUMMIT's intellectual property assets in January 2012, Defendants have exercised complete dominion and control over the "Z Market" to the point where they have and continue to control 100% of the "Z Market" output, demonstrated by their worldwide release of *Breaking Wind* in January 2012 and followed by their exclusionary conduct causing Plaintiff to be frozen out of the "Z Market" altogether.

551. Defendants' current 100% market share of the "Z Market" is highly relevant in determining whether Defendants possess monopoly power because the higher a market share, the stronger is the inference of monopoly power.⁷⁷

552. At the time of filing of this Complaint, Defendants are in possession of a predominant share of the "Z Market" and exert absolute control over which motion picture parodies are permitted to enter and be distributed to the "Z Market," regardless of the channel of distribution.⁷⁸

553. When Defendants' film *The Twilight Saga: Breaking Dawn Part 2* was released in November 2012, there did NOT exist readily available substitutes for Plaintiff's "Z Market Product" *Twi harder*. In fact, there was no cinematic parody released to the WMPI marketplace at or around the time that *The Twilight Saga: Breaking Dawn Part 2* was released to theatrical

⁷⁷ See, e.g., *American Tobacco Co. v. United States*, 328 U.S. 781, 797, 66 S.Ct. 1125, 1133, 90 L.Ed. 1575 (1946) (holding that "over two-thirds of the entire domestic field of cigarettes, and ... over 80% of the field of comparable cigarettes" constituted monopoly power); *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (finding that 87% of the accredited central service business "leaves no doubt" that defendants had monopoly power) *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90,98 (2d Cir. 1998) (presuming market power from 72 percent share of the market); *Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc.*, 651 F.2d 122, 129 (2d Cir.1981) ("a market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power").

⁷⁸ *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) ("The existence of [market] power ordinarily may be inferred from the predominant share of the market.");

audiences in November 2012 or to home video / VOD / EST distribution channels in March 2013. This is because Defendants unlawfully acted through its enterprise monopoly to ensure that there would be no “Z Market Products” available to the consumers who demanded them.

554. Substantial evidence to be adduced at trial demonstrates that Defendants controlled a monopoly share of the “Z Market,” from at least early 2009 and continuing through the present, and that such evidence may consist of:

- (a) Defendant SUMMIT’s authorization of the *Vampire Sucks*, feature-length parody, released in August/November 2010;
- (b) Defendant LIONSGATE’s distribution of *Breaking Wind*, feature-length parody, released in January/March 2012;
- (c) maximum pressurized IP enforcement taking down YOUTUBE and VIMEO parody material;
- (d) aggressive exclusionary conduct foreclosing Plaintiff from bringing *Twiharder* to the “Z Market” in or about October-November 2012, despite the fact that no other theatrical or home video substitutes existed at the time to satisfy consumer demand for fresh parodical material to mock and ridicule Defendants’ “A Market Products” streaming into the mass consumer consciousness.

555. Even after *The Twilight Saga: Breaking Dawn Part 2* was released theatrically in November 2012 and then to packaged home media in March 2013, Defendants have continued to patrol the “Z Market” with an iron hand, as they have persisted to demand the destruction of the *Twiharder* motion picture and all other audio-visual and photographic materials related to Plaintiff’s lawful American business.⁷⁹

⁷⁹ Legal actions, when taken by a monopolist, may give rise to liability if anticompetitive. See Greyhound Computer v. International Business Machines, 559 F.2d 488, 499 (9th Cir.1977).

G. BARRIERS TO MARKET ENTRY

(1) ACCESS TO DISTRIBUTION CHANNELS

556. With the advances in technology, virtually any talented filmmaker can create a quality “motion picture” on a limited budget. The key to success in the WMPI is distribution. Those market players who control the channels of distribution – which is worldwide – ultimately control substantive content choices presented to consumers as well as the prices that consumers pay for those choices.

557. New competitors in the “Z Market,” such as Plaintiff here, face high market barriers to entry to the “Z Market” because without access to theatrical distribution channels or packaged media / VOD / EST distribution channels, their copyrighted work will have a limited audience and will otherwise not be seen as a mainstream or “professional” release.

558. Further, even if Plaintiff finds distribution for *Twiharder*, Defendants’ anticompetitive conduct makes it virtually impossible for Plaintiff to expand its market offerings through the contemplated sequel *Twiharder, Way Harder*, which may transition Plaintiff’s works into a series of its own.

559. Defendants’ sham C&D campaigns constrain the normal operation of the “Z Market” to the extent that the problem is unlikely to be self-correcting. For example, if Plaintiffs wanted to create a parody of Defendants’ popular *Hunger Games* movies series, or its forthcoming *Divergent / Insurgent* movies series, all of which deal with Defendants’ vision of teenagers living in dystopian American societies where the ideals of our Founding Fathers have been violently usurped, the barriers of “Z market” entry will remain particularly strong in light of Defendants’ anticompetitive conduct respecting *The Twilight Saga* movies.

(2) SUPERIOR MARKET POSITION

560. Not only do Defendants here control their own copyrights to the underlying

dramatic material, but they also stand in control of superior financial and technological resources, have greater access to worldwide consumers via social media marketing and general commercial advertising, and have made tremendous strides in commandeering worldwide distribution channels (via contractual relationships and strategic alliances)⁸⁰ to ensure that any independent “Z Market Products” will not see the light of day without Defendants’ express authorization and promotional support.

561. These factors together with the economies of scale support a determination of high barriers to “Z Market” entry by new competitors and to increased output of “A Market Products” without any corresponding quality output from the “Z Market.”⁸¹

562. Under these conditions, a “Z Market” producer such as Plaintiff cannot easily enter the “Z Market” and have its “motion picture” released theatrically or through home video / VOD distribution channels. This is particularly true because where film studios such as LIONSGATE engages in sham “cease-and-desist” campaigns based on their purported intellectual property rights, there is no “raw material” available in the “A Market” for the “Z Market” Producer to parody.⁸²

563. Further, the common phrase “it’s a small town” can be used to accurately

⁸⁰ See Ex E. (BTL_000306) (According to LIONSGATE’s CEO: “The acquisition of Summit gave us the critical mass to negotiate higher settlement rates with our exhibition partners, structure output deals around the world for our films, negotiate a new domestic distribution agreement for our DVD releases and achieve greater efficiencies in our media buying. In the past six months, we’ve created our own global distribution infrastructure by establishing output deals with blue chip partners covering 80 percent of the world’s movie going population outside India and China, substantially mitigating our risk and increasing our long-term visibility in our international theatrical business.”)

⁸¹ See, e.g., Geneva Pharm. Tech. Corp. Barr Labs. Inc., 386 F.3d 485,499 (2d Cir. 2004) (high barriers to entry found where only incumbent had ready access to supply of ingredient necessary to manufacture drug and where suppliers faced regulatory requirements in gaining FDA approval); Energex Lighting Indus., Inc. v. N. Am. Philips Lighting Corp., 656 F. Supp. 914, 921 (S.D.N.Y. 1987) (monopoly power may exist where defendant had only 25% market share but engaged in pricing practices that may have been responsible for the number of competitors shrinking from eleven to four).

⁸² See, e.g., Geneva Pharm. Tech. Corp. v. Barr Labs. Inc., 386 F. 3d 485, 499 (2d Cir. 2004) (citing difficulty sourcing raw material as barrier for potential entrants into generic pharmaceutical market).

describe the Hollywood movie-making machine and the WMPI in general. The intimate size of the movie-making industry, coupled with the highly competitive nature of the entertainment business, is one more factor weighing in favor of finding a high barrier to entry.⁸³

H. MONOPOLY LEVERAGING

(1) SINGLE COPYRIGHT MONOPOLY

564. Feature length motion pictures generally include four (possible) divisible copyrightable elements: (a) cinematographic (audio-visual) material; (b) screenplay (literary material); (c) pre-existing musical compositions; (d) pre-existing photographs.

565. Here, the multi-billion dollar movie franchise that would become *The Twilight Saga* film series began with the Defendant SUMMIT's monopoly power in Copyright Registration No. PA 1-616-599 [Ex. B (BTL_00060)], which is for the "entire motion picture" work of cinematographic material entitled *Twilight* (but excluding pre-existing photographs, pre-existing music and literary material). [Ex. B (BTL_00060)]

566. Titles of motion picture works, such as *Twilight*, *New Moon*, or *The Twilight Saga* cannot be copyrighted.⁸⁴

(2) ENTERPRISE COPYRIGHT MONOPOLY

567. There is a recognized distinction between a "statutory monopoly," which is the grant conferred upon a copyright owner for one work, and an "enterprise monopoly," which is an aggregate of copyrights granted to a single owner.

⁸³ It is more difficult for a firm to enter a small market because of contractual relationships among existing firms and because achieving efficient scale of production is harder. See, e.g., United States v. Griffith, 334 U.S. 100, 102, 68 S. Ct. 941, 943, 92 L. Ed. 1236 (1948) (in 62% of towns in which defendant operated, market had only one theater).

⁸⁴ See 37 C.F.R. §202.1(a); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.16 (2000).

The holder of an *enterprise monopoly* [an aggregation of copyrights] has ... an additional, affirmative power to provide for the broad dissemination of copyrighted material consistent in principle with his own social, political, and economic views.⁸⁵

568. Here, with the release of motion picture *The Twilight Saga: New Moon* and the procurement of Copyright Registration No. PA 1-653-512, effective November 24, 2009 [Ex. C (BTL_000064)], Defendant SUMMIT acquired an enterprise copyright monopoly that could be utilized to disseminate its own social, political and economic views.

569. Defendants' enterprise copyright monopoly would aggregate further through release of the third installment in the motion picture series, *The Twilight Saga: Eclipse* and the procurement of Copyright Registration No. PA 1-689-175, effective July 2, 2010 [Ex. C. (BTL_000066)]

(3) COPYRIGHT MONOPOLY LEVERAGING VIA TRADEMARK ACT

570. In order to fully leverage its enterprise copyright monopoly and create a monetizable "brand" and tentpole franchise utilizing *The Twilight Saga* motion pictures as a foundation, Defendant SUMMIT looked to federal trademark law. This was because the Copyright laws only accord protection to the actual cinematographic works (and the expressions embodied therein), but do not extend protection to Defendants' film titles nor the ancillary goods and services that could be merchandised to the public in order to capitalize on the box office popularity of *The Twilight Saga* motion pictures.

571. Pursuant to USPTO rules and long-standing judicial precedent, the title of a single creative work, such as *Twilight*, is not registrable on the Principal Register or the Supplemental Register.⁸⁶ This is because "single-work titles"⁸⁷ are deemed *per se* "inherently

⁸⁵ Goldstein, Paul, *Copyright and the First Amendment*, 70 COLUM. L REV. 983, 984 (1970).

⁸⁶ TMEP §1202.08 (citing Herbko, 308 F. 3d 1156, and Cooper, 254 F. 2d 611).

descriptive” or “inherently generic”⁸⁸ and thus incapable of the necessary distinctiveness for federal trademark registration. [Ex. C (BTL_000204)]

572. Pursuant to USPTO rules and longstanding judicial precedent, even if a single-work title has acquired secondary meaning, i.e., significant recognition among the public,⁸⁹ such single-work title will NOT be eligible for registration.⁹⁰

573. Notwithstanding these well-established trademark rules, Defendant SUMMIT was somehow able to procure at least two separate trademark and servicemark registrations in connection with the marketing of the motion picture itself as a “good” or “service” using a single title motion picture work *TWILIGHT*. [Ex. C (BTL_000123; BTL_000124)] As per Count V of this Complaint, Plaintiff seeks to cancel these registrations on several key grounds, the most obvious being that such registrations are strictly prohibited in light of USPTO’s own rules and over 50 years of judicial precedent.

574. Defendant SUMMIT also applied for an incomprehensible number of federal trademarks / servicemarks using the word “Twilight,” both as a single word and in composite with other words, to “protect the wordmark in connection with selling countless other wares that have nothing to do with the content embodied in the motion picture itself.” [Ex. C (BTL_000129-157)]

575. Plaintiff here is not the first victim of Defendants’ vexatious allegations that

⁸⁷ See James L. Vana, *Single Work Titles and Group, Artist or Author Names—Registrability Revisited*, 88 TRADEMARK REP. 250 (1998) (source for phrase “single- work title”).

⁸⁸ See *In re Cooper*, 254 F. 2d 611, 615 (“[H]owever arbitrary, novel or non-descriptive of contents the name of a book—its title—may be, it nevertheless describes the book.”); *Herbko*, 308 F. 3d at 1164 (stating that precedent treats single-work titles as “‘inherently descriptive’ at best and ‘inherently generic’ at worst”); 2 MCCARTHY §10:4 n.1.50 (Trademark Office views titles as “not just ‘descriptive,’ but ‘generic.’”).

⁸⁹ 2 MCCARTHY § 15:2

⁹⁰ 2 MCCARTHY § 10:4

intentionally collapse copyright infringement and trademark infringement into ONE claim with the objective of curtailing First Amendment rights. Defendants have engaged in an anticompetitive pattern and practice of transmitting sham C&D letters to alleged “copyright infringers” solely on the basis of what Defendants purport to be their *trademark* interests. See, e.g., Smith vs. Summit Entertainment, LLC, 2011 WL 2200599, No. 3:11-CV-348 (N.D. Ohio June 6, 2011) (sustaining claim against Summit under 17 U.S.C. § 512 for wrongful assertion of copyright infringement where Summit caused the “take down” of plaintiff’s pre-existing copyrighted song solely because of the *tradedress* used by Plaintiff to promote the CD).

576. Defendants’ bad faith vis-à-vis Plaintiff is readily demonstrated by the fact that even where Plaintiff, who did not have the financial resources to litigate in the Fall of 2012, offered Defendants to: (a) change its *tradedress*; (b) change the title of the *Twiharder* motion picture to another title; and (c) surrender its very own website www.twiharder.com to appease in order to appease LIONSGATE and SUMMIT – Defendants proved to be entirely unrelenting. [Ex. A (BTL_000025)].

577. Because Defendants were, at all relevant times, seeking to enforce its illusory moral rights (rather than any real statutory interests) and subjectively perceived their *The Twilight Saga* motion pictures to be “wholesome” works of art in contrast to Defendants’ motion picture which Defendants perceived to be of no “social value justifying a fair use defense,” Defendants were willing to accept nothing less than *outright destruction* of Plaintiff’s original motion picture no matter how it was packaged or marketed in the stream of commerce. [Ex. A. (BTL_000033)]

578. Defendants’ position [Ex. A. (BTL_000033)] had nothing to do with whatever proprietary or pecuniary rights they had acquired by virtue of the Copyright Act or the Lanham Act. For whatever reason, Defendants simply didn’t approve of *Twiharder* and didn’t want the

ideas expressed in *Twiharder* to enter the consumer marketplace. And so they killed it. Defendant's unilateral conduct not only caused direct and substantial economic injury to Plaintiff, it manifested an unbridled act of raw censorship.

(4) EXCLUSIONARY CONDUCT

579. Defendants have used its copyright monopoly power in its own "A Market Products," i.e., *The Twilight Saga* motion picture series, to "foreclose competition...[and]... to destroy a competitor" in the "Z Market" for work parody and comedic spoofs.⁹¹

580. Defendants have willfully acquired monopoly power in the adjacent and/or downstream distribution markets, including the "B," "JX" and "Z Markets," by leveraging its enterprise copyright monopoly *through* its vast number of federal trademark and servicemark registrations. In other words, Defendants have attempted to mask the clear absence of any valid copyright infringement claims against its competitors (including Plaintiff) by embedding its copyrighted works in the guise of trademark registrations.

581. Defendants' exclusionary conduct, as alleged herein, was specifically intended to freeze Plaintiff out of the adjacent antitrust market – the "Z Market" – in which Plaintiff operates as an independent producer of feature-length parodies and comedic spoofs of Defendants' purportedly "wholesome" *The Twilight Saga* films.

582. Defendants have engaged in anticompetitive conduct in its attainment or maintenance of monopoly power in the "Z Market" through systematic use of sham "cease-and-desist" letters which allege copyright infringement of motion picture works by reference to voluminous scores of largely voidable U.S. trademark and servicemark registrations, many of which appear to have been procured by Defendants from the USPTO by mistake of law.

⁹¹ Kodak, 504 U.S. at 482-83, 112 S.Ct. at 2090 (quoting United States v. Griffith, 334 U.S. 100, 107, 68 S.Ct. 941, 945, 92 L.Ed. 1236 (1948)).

583. Defendants adopted its IP enforcement policies as part of a scheme of willful acquisition or maintenance of monopoly power designed to absolutely control all “derivative works” of *any* kind and *any* nature and with absolute disregard for the statutory limitations imposed on Defendants’ exclusive rights by Section 107 of the COPYRIGHT ACT.

584. From the perspective of Defendants’ worldwide commercial enterprise to brand its young adult fantasy movie franchises, the Fair Use doctrine, as codified in Section 107 of the Copyright Act, is merely an academic theory that bears no relation to the real world economics and moral imperative to take down *any* form of expression that remotely pays reference to *The Twilight Saga* franchise.

585. Defendants have wrongfully leveraged the limited monopoly power accorded to it by the COPYRIGHT ACT as an iron boot to suppress publication of key competitive viewpoints and vital modes of artistic expression intended to benefit the People; rather than using their statutory privileges as a shield to protect Defendants’ economic property interests against counterfeiters in the open market.

586. Defendants have leveraged their market position as major motion picture producers and distributors to prohibit a vast distribution network from disseminating *Twiharder*, a work that was not itself owned and controlled by LIONSGATE. This anti-competitive practice ensured that only “authorized” or commissioned feature film parodies, such as *Vampire Sucks* and *Breaking Wind*, would gain access to WMPI distribution and the global marketplace.

587. If the Honorable Court does not remedy LIONSGATE’s anti-competitive conduct, vital artists such as independent comedic filmmakers, clever parodists and sharp-witted satirists shall be “cleansed” in perpetuity from the WMPI marketplace and “Z Market” consumers will be limited to see only that which is “authorized” by the very source or target of the parodist’s criticism. The result, evidenced by seven straight years of “parody” feature films

by the IDENTICAL “authorized” filmmakers (Seltzer/Friedberg), is formulaic juvenile fare that predominately relies on human flatulence as the source of their artistic expression.

588. Defendants’ dominance of the “A Market” and dual monopolistic control of the “Z Market” produces an anti competitive effect that deprives the marketplace of the robust and free exchange of ideas.

589. Defendants have unlawfully maintained their monopoly position in the “Z market” through exclusionary conduct, by using sham C&D letters to freeze parodists out of the “Z Market” entirely.

590. Whether or not Defendants can be forced to license its copyrights or trademarks concerning *The Twilight Saga* to a parody filmmaker, they are foreclosed by antitrust laws from taking steps through anticompetitive C&D tactics that make it impossible for a “Z Market” competitor such as Plaintiff to make and sell its own brand of work parody.

591. Defendants are preventing market forces from operating by engaging in coercive conduct to affect consumer choice. Such coercive conduct is effectuated by excluding parody filmmakers from the “Z Market” and using the same formulaic filmmakers, over and over, to produce “safe” and juvenile parody for theatrical release.

592. In short, Defendants have altered the functioning of the markets. In doing so, Defendants have reduced consumer choice for “Z Market” products via systematic abuse of U.S. copyright and trademark laws.

(5) DEPRIVATION OF “ESSENTIAL FACILITIES”

593. By virtue of its dominant position in the WMPI market as a “major movie studio,” Defendant LIONSGATE controls the facilities essential to competition in the “Z Market.”

594. In this case, the “essential facilities” necessary to compete in the WMPI are represented by two “threshold” service providers: (a) major E&O insurers such as CHUBB; and

(b) WMPI distribution firms such as GRAVITAS (VOD / EST digital distribution via WBDD) and BREAKING GLASS (DVD / Blu-Ray packaged media).

595. Without the “essential facilities” of an E&O insurance policy issued by a national underwriter AND without a distribution licensing agreement offered by a WMPI distributor, an independent filmmaker such as Plaintiff here cannot gain access to the WMPI, consisting of more than “1 billion households,” and therefore cannot reach its intended “Z Market” audience who are ready, willing and able to laugh along with Plaintiff’s motion picture *Twi harder*.

596. By employing anticompetitive C&D tactics, Defendants have purposefully foreclosed Plaintiff from accessing the “essential facilities” necessary to compete in the “Z Market.” This is demonstrated by the indisputable fact that both GRAVITAS and CHUBB, each of whom retain in-house attorneys to navigate complex matters concerning Fair Use under the Copyright laws, approved Plaintiff’s motion picture *Twi harder* for E&O Insurance (CHUBB) and WMPI distribution (GRAVITAS) only to suddenly revoke Plaintiff’s access to their respective facilities upon learning of Defendants’ 6/27/12 C&D Letter to Plaintiff.

597. Indeed, even if Plaintiff was able to secure E&O insurance for *Twi harder*, which the insurance broker claimed was virtually impossible in light of Defendants’ 6/27/12 C&D letter.

598. GRAVITAS’ revocation of its worldwide licensing agreement, a highly valuable and tangible business asset, was based solely on the *existence* of Defendants’ sham 6/27/12 C&D Letter, and such decision was made by GRAVITAS irrespective of the underlying legal merits of Defendants’ frivolous claims for copyright and trademark infringement.

599. The rationale for GRAVITAS’ decision to revoke the worldwide licensing agreement was clearly explained to Plaintiff by Brendan Gallagher, Vice President of Business

Affairs for GRAVITAS, who is also a licensed attorney with a background in commercial litigation and insurance disputes. [Ex. S (BTL_001103)] The rationale boils down to: (a) Defendants' status in the WMPI as a "large studio"; and (b) Defendants' willingness to engage in anticompetitive C&D tactics to intimidate market players.

At this point, I don't think we [GRAVITAS] can do it [distribution]. **We've been involved in situations such as this in the past where a large studio has leaned on our distribution partners to take down a particular film, even if the legal justification for doing so is very disputable.** [Ex. S (BTL_001157)] (emphasis added) ...

We [GRAVITAS] want to avoid a situation in which you incur delivery costs, we put the film out in the VOD market, **then a host of cease-and-desist letters from [Defendant] Summit prompt the various platforms to take the film down.** [Ex. S (BTL_001157-58)] (emphasis added)

600. Thus, the four well-known "Fair Use" factors that have been articulated by Congress in Section 107 of the COPYRIGHT ACT of 1976, and the 35 years of federal judicial decisions that have weighed such factors, have absolutely NO bearing on the real world business concerns of WMPI distribution.

601. With respect to the relevant antitrust markets at issue in this case, the only action Defendants need to take in order to deprive Plaintiff of the "essential facilities" to enter the "Z Market" is to retain a Hollywood IP counsel to draft a C&D letter and transmit it to an antitrust victim. No litigation is necessary to inflict the antitrust injury.

602. As explained by GRAVITAS' sophisticated counsel and VP of business affairs, who has prior experience in such matters, the legal claims set forth in Defendants' C&D Letter have absolutely NO impact on the distributor's business transaction vis-à-vis Plaintiff.

603. The WMPI distributor's decision to terminate its economic relations with an independent filmmaker, which wholly deprives Plaintiff from reaching its intended audience for its motion picture, is based solely on the *status* and *position* of Defendants as "a large studio"

(i.e., having dominant market power) and Defendants' willingness to "lean" on the key market players by utilizing "a host of cease-and-desist" letters to "take down a particular film." (i.e., using that dominant market power to exclude its competition from the antitrust markets via C&D tactics) [Ex. S (BTL_001157-58)]

(6) REFUSAL TO DEAL

604. In addition to Defendants' sham C&D tactics which caused CHUBB, GRAVITAS and other key market players in the WMPI to terminate their economic relations with Plaintiff in or about July 2012, Defendant LIONSGATE also violated Section 2 of the SHERMAN ACT by refusing to deal with Plaintiff *directly*.

605. Grindstone Entertainment Group, LLC ("GRINDSTONE") is a department or division of Defendant LIONSGATE's Home Entertainment division and/or a wholly owned subsidiary of LIONSGATE that functions as a mere instrumentality or agent of LIONSGATE's distribution business in the WMPI. [Ex. E (BTL_000241)]

606. On September 28, 2012, at 10:20 a.m., Plaintiff e-mailed Ryan Black, the Director of Acquisitions & Development for GRINDSTONE, with the express intention of pitching *Twiharder* to Defendant LIONSGATE for distribution through its division GRINDSTONE. Plaintiff described its film as a "parody of *Twilight*," stated that "Twiharder is an extremely incredible fit for the Lions Gate family" and requested a formal "meet-and greet" with Mr. Black to present a screening of *Twiharder* and supporting press materials.

607. On September 28, 2012, at 10:45 a.m., within 25 minutes of Plaintiff's transmission of its initial e-mail to Defendant LIONSGATE, Mr. Black responded: "Thanks for the follow-up email. We must respectfully hold to our initial Pass on the film. We wish you the best of luck with the release ..."

I. WILFUL ACQUISITION OF MARKET POWER

(1) STEP ONE: TARGETING THE “A MARKET”

608. Defendant LIONSGATE, which is a relatively new, albeit extremely powerful incumbent, has developed a keen marketing formula for its movie brands such as *The Twilight Saga*, *Hunger Games* and the upcoming *Divergent / Insurgent* series that is patterned after the tentpole franchise model developed by the *Harry Potter* and *Lord of the Rings* franchises, which set the early benchmark in the new millennium for cross-marketing a movie brand across all platforms.

609. Defendants’ marketing plan for targeting the “A Market” begins with a trilogy or series of books written by *first-time* authors and targeted to young adults. The books come to dominate all or most of the top spots on the NEW YORK TIMES Best Sellers List.

610. Defendants’ easy-to-read books represent screenplays published several years in advance of their cinematic debut. Defendants’ pre-marketing of their motion pictures through the publishing industry helps to build awareness of the proposed brand from the “ground up,” largely by targeting pre-teens and school children who are attracted to tales of fantasy, forbidden love, and paranormal intrigue.

611. The break-out, seemingly overnight success of the first *Twilight* film in November 2008, bolstered by a passionate legion of young female fans (and their mothers) who materialized into the public consciousness as if from nowhere, was actually part of a brilliant marketing plan that initiated at least 4-5 years prior to the film’s debut.

612. While the first *The Twilight Saga* film, released in November 2008, was a smash hit at the box office, it was not until the second film in the series debuted at theaters in November 2009 that Defendant SUMMIT could be said to have established a “series,” upon which all of its other marketing, promotional, merchandising and sales techniques could now

launch into the foreseeable future.

(2) STEP TWO: MONOPOLIZE THE “B MARKET”

613. Once *The Twilight Saga* movies, i.e., the “A Market Products,” became established in the public consciousness as a popular fantasy film series in late 2009 / early 2010 with the theatrical box office success of *The Twilight Saga: New Moon*, Defendant SUMMIT moved to reinforce and expound upon *The Twilight Saga* films by marketing “B Market Products” such as documentary films, including *Twilight in Forks: Saga of the Real Town* (Mar. 20, 2010), *The Twilight Saga: Music Videos and Performances* (Dec. 4, 2010) and *Destination Forks: The Real World of Twilight* (Dec. 4, 2010).

614. In addition to the financial incentives for distributing such documentaries, Defendants’ “B Market” products were intended to build further awareness for *The Twilight Saga* brand, provided that the underlying message of such awareness was controlled by Defendants.

615. Defendants also acquired monopoly power in the “B Market” through strategic control over “fansites,” i.e., on-line blogs or websites dedicated to The Twilight Saga franchise. Those fans of *The Twilight Saga* movie series who met certain prerequisites were selected by Defendants to strengthen the brand awareness of *The Twilight Saga* franchise. In return, their “independent” websites or blogs would become extensions of the Defendants’ internal marketing plan and would receive traffic from the homebase, thereby increasing the prestige of the independent agents.

616. Many of the fansite operators would come to be featured in Defendants’ “B Market Products” through on-screen documentary profiles that testified to the strength and “wholesomeness” of *The Twilight Saga* brand.

617. As for those in the B Market who were “unauthorized,” such as documentary filmmakers, they became victims of Defendant SUMMIT’s aggressive litigation tactics. In February 2010, SUMMIT sued Topics Entertainment, which had produced a documentary about Forks, Washington, the purported “real-life” setting of the *Twilight* films (but not books). SUMMIT claimed copyright infringement because the DVD covers of both Topic’s documentary and SUMMIT’s own documentary about Forks featured a moonlit forest.

618. Operators of fan magazines also fell victim to Defendant SUMMIT’s acquisition of monopoly power. SUMMIT sued to shut down an unofficial *Twilight* fan magazine, in part for using stock publicity photos. SUMMIT had licensed use of the photos for “journalistic purposes” and argued that Beckett Media, the magazine’s publisher, violated the license because its use of the pictures was accompanied by efforts to sell *Twilight*-related merchandise.

619. There does not currently appear to be any documentaries within the B Market Product class that were produced and distributed independently from or without authorization of Defendants. This demonstrates that Defendants have managed to monopolize the secondary source market of documentary filmmaking about *The Twilight Saga*, which means the public only gets to see, hear and purchase “behind-the-scenes” footage that Defendants have authorized.

(3) STEP THREE: CHILL THE “JX MARKET”

620. The “JX Market,” as described herein, is an adjacent market consisting of primary works created by third parties using literal copyrighted elements from “A Market Products”.

621. Defendant SUMMIT’s monopolization strategy with the JX Market was simple: chill speech. Thus, remixes, mash-ups, sampling, collages, montages – all of these so-called

“derivative works” were proclaimed by Defendant SUMMIT to be prohibited speech, even if such works are posted to free open marketplaces like YouTube.

(4) STEP FOUR: MONOPOLIZE THE “Z MARKET”

622. Defendants leveraged their enterprise monopoly in the “A Market” (and acquired monopoly in the “B Market”) to extend such monopoly into the “Fair Use Zone” of the “Z Market,” where Defendants have now managed to unduly restrict any and all competition.

623. Defendants’ anticompetitive conduct has had the deleterious market effect of limiting consumer choice to only those feature length parodies that Defendants have commissioned or authorized themselves.

624. Defendants improperly leveraged the federal trademark system as a means to create *the appearance* to Plaintiff, and certain industry players seeking to transact business with Plaintiff, of greater copyright protection in Defendants’ motion pictures than permitted by their statutory privilege.

625. Defendants are foreclosed from using anti-competitive means to extend its copyright monopoly beyond the statutory grant intended by Congress.

(5) STEP FIVE: MAINTAIN “A” TO “Z” MONOPOLY

626. Defendants are currently leveraging their monopoly power in the relevant “A Market” to maintain monopoly power in the “Z market” in violation of Section 2 of the SHERMAN ACT.

627. Defendants have leveraged their (purported) collective intellectual property rights and dominant market position in the “A,” “B,” “JX” and “Z” Markets to unnecessarily exclude Plaintiff from distributing its original motion picture to “Z Market” consumers in order to maintain its monopoly in the “Z Market,” which Congress and the Courts have recognized as

a Fair Use zone that limits the exclusive rights granted to Defendants under Section 106 of the Copyright Act.

628. Defendants have continued to leverage its enterprise copyright monopoly to engage in unreasonable market manipulation that restrains trade in adjacent and downstream markets related to *The Twilight Saga* motion pictures.

629. Defendants' acquisition and maintenance of its monopoly power in the "Z Market" did not result from Defendants' production and distribution of superior work parodies, like the abysmal *Breaking Wind* which was universally panned. Rather, Defendants have willfully acquired and maintained power in the "Z Market" as a means to "dumb down" the quality of the work parody in the theatrical and worldwide digital distribution marketplace.

630. Defendants' maintenance of monopoly power in the "Z Market" did not result by some historic accident, like the absence of other parodists in the market willing to produce feature films.

631. Defendants' maintenance of monopoly power in the "Z Market" did not result from business acumen because Defendants' IP enforcement protocol has been consistently documented as oppressive, inflexible, unwarranted, unfair and unlawful by a wide range of media observers, the American business community and legal scholars.

632. Defendants' anticompetitive conduct to acquire and maintain its monopoly power has been carried out with reckless disregard for the Law of the Land and the American public interest in a robust, wide-open marketplace of ideas.

J. ABSENCE OF VALID BUSINESS JUSTIFICATION

(1) *TWIHARDER* = FAIR USE

633. As per Count I of this Complaint, Defendants' allegations of copyright

infringement against Plaintiff cannot constitute a valid business justification in defense of antitrust laws because Plaintiff's *Twiharder* motion picture is a Fair Use under Section 107 of the COPYRIGHT ACT.

(2) NO PRO-COMPETITIVE BENEFITS

634. Defendants' exclusionary conduct in the "Z Market" has had absolutely no pro-competitive benefits. Defendants' conduct has simply shut down ALL competition in the "Z Market."

635. Regardless of the "Fair Use" limitation on Defendants' statutory monopoly, Defendants' acquisition and maintenance of monopoly power in the "Z Market" ensures that only filmmakers who are authorized by Defendants will be able to reach "Z Market" consumers in the WMPI.

636. In terms of feature-length parodies intended for domestic theatrical release, Defendants have only authorized the identical filmmakers – Seltzer/Friedberg – to write and direct feature-length parodies of its major movie franchises.

637. Seltzer/Friedberg were authorized and/or commissioned by Defendants to produce *Vampire Sucks*, the only feature length motion picture parody of *The Twilight Saga* series to be theatrically released to the U.S. box office, as well as the upcoming *Starving Games*, a feature-length parody of Defendants' *Hunger Games* movie franchise scheduled to be released in October 2013.

(3) LACK OF CONSUMER CHOICE

638. Defendants' acquisition and maintenance of monopoly power in the "Z Market" for *The Twilight Saga* has ensured that the public's demand for feature-length parody movies scheduled for U.S. theatrical release will only be met by whatever Defendants – and Defendants

alone – choose to release.

639. In terms of U.S. theatrical releases, since the debut of *The Twilight Saga* in November 2008, Defendants have only permitted the consumer marketplace to view a feature-length parody of *The Twilight Saga* where the parody was written and directed by the team of Seltzer/Friedberg.

640. Defendant LIONSGATE also markets another popular movie franchise, *Hunger Games*, which is also based on a book trilogy but which is expected to generate at least four feature-length films over the course of the next three years. LIONSGATE has only authorized and/or commissioned Seltzer/Friedberg to write and direct *Starving Games*, a feature-length parody of *Hunger Games*. There have been no other announcements in the press concerning other motion pictures in development or scheduled for release that may parody *Hunger Games*.

641. With respect to *The Twilight Saga*, Defendants have purposefully limited the consumer marketplace to viewing ONE parody of its tentpole franchise in U.S. movie theaters, despite having released FIVE feature-films in the span of four years, not to mention numerous “B Market” documentaries and scores of other merchandised products.

642. In contrast to other “Z Market” motion pictures that have historically received positive critical reviews and strong box office performance, such as *Airplane!* (98% positive critical review / 85% audience approval from 262,533 users)⁹²; *Young Frankenstein* (94% critical review / 91% audience approval from 184,196 users); *Blazing Saddles* (89% critical review / 89% audience approval from 192,296 users); *Naked Gun* (89% critical review / 78% audience approval from 155,797 users); *Austin Powers* (70% critical review / 75% audience approval from 682,217 users); *Hot Shots!* (83% positive critical reviews / 63% audience approval from 140,210 users); and *Scary Movie* (54% critical review / 50% audience approval

⁹² Rottentomatoes.com

from 1,070,389 users), the only theatrically-released spoof of Defendants' *Twilight Saga* franchise - *Vampire Sucks* - received a dismal 4% rating from critics and a mere 31% audience approval (based on 73,665 user ratings).

643. Based on the gross box office receipts generated by *Vampire Sucks* in worldwide theatrical release (totaling more than \$90 million), and in light of the extremely negative reviews of *Vampire Sucks* as indicated by both critics and audiences alike, it is reasonable to conclude that the market demand for a feature-length parody film of *The Twilight Saga* in late 2010 was so strong that audiences were willing to spend money to see the film in movie theaters even if the utility of *Vampire Sucks* as a parody was – by national consensus – extremely low quality (i.e., not funny). This is a clear symptom of a manipulated market where Defendants have excluded competition, resulting in limited consumer choice and a resulting detriment to the public marketplace.

644. Defendants' anticompetitive conduct in excluding Plaintiff (and other independent parodists) from the "Z Market" impairs the proper functioning of the market by severely limiting the consumer choice to whatever feature-length parody the Defendants want the national and international audience to see in theaters and within the WMPI distribution chain, no more how poor the quality of the motion picture.

645. Defendants' acquisition and maintenance of monopoly power in the "Z Market" also guarantees that the brand of humor in Defendants' commissioned and/or authorized parodies will be predominantly targeted to juvenile boys, as evidenced by the statistics provided by FOX that the theatrical audience for *Vampire Sucks* consisted of more than 45% of pre-teen and young adult boys. [Ex. I (BTL_000423)]

646. The adolescent male market demographic for Seltzer/Friedberg work parody demonstrates that Defendants' have chosen to only authorize and/or commission parody films

of *The Twilight Saga* (and *Hunger Games*) that will predominately consist of what was traditionally known as “low burlesque,” i.e., crude sexual humor, physical comedy, and site gags. While such brand of humor has been on exhibition in works ranging from Shakespeare’s plays to Mel Brooks’ classic 1970s films, such brand of humor was often fused with “high burlesque,” consisting of sharp wit, satirical prose, deadpan and complex innuendos designed for more sophisticated audiences.

647. As a result of Defendants’ exclusionary conduct in acquiring and maintaining monopoly power in the “Z Market,” Defendants have guaranteed that “high burlesque,” a vital form of expression which carries great historical and cultural significance in the literary and cinematic arts, shall be banished from movie theaters (widely considered the best venue to experience such comedy whilst in the company of one’s fellow citizens).

(4) ABSENCE OF TRUE ECONOMIC INCENTIVE

648. Defendants’ intent to exclude Plaintiff’s motion picture *Twiharder* from the “Z Market” and to refuse to deal with Plaintiff is relevant to this litigation.⁹³

649. Defendants’ allegations of copyright infringement against Plaintiff via anticompetitive C&D tactics are motivated by factors unrelated to their economic incentive to produce better motion pictures in the “A Market.”

650. Upon information and belief, Defendants granted authorization to 20th Century Fox and Regency Enterprises to produce and distribute *Vampire Sucks* in exchange for valuable consideration.

⁹³ *Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927) (courts will look at whether a defendant acted with the “purpose to monopolize” to determine whether a refusal to deal runs afoul of Section 2 of the Sherman Act); *U.S. Football League v. Nat’l Football League*, 842 F.2d 1335, 1359 (2d Cir. 1988) (“Evidence of intent and effect helps the trier of fact to evaluate the actual effect of challenged business practices in light of the intent of those who resort to such practices.”);

651. In or about August 2011, Defendants authorized a parodist to direct a feature-length parody of *The Twilight Saga* called *Breaking Wind*, which was officially released by Defendant LIONSGATE on January 13, 2012.

652. Defendants' intent to make money through the distribution of *Breaking Wind* in January 2012 was highly questionable considering that Defendant LIONSGATE released *Breaking Wind* with an R Rating, which meant that the motion picture was deemed unsuitable for exhibition to the core target audience of pre-teen and teenage boys who made up over 45% of the audience for *Vampire Sucks* (a PG-13 rated film). *Breaking Wind's* R Rating also helped ensure that a large majority of the so-called Twihards would not be of suitable age to view the film.

653. Defendants had the financial capacity to theatrically release *Breaking Wind* in the U.S. but affirmatively chose not to do so, instead opting to release the film theatrically in select foreign markets. [Ex. J (BTL_0000484)] Given the strong performance of *Vampire Sucks* at the domestic and worldwide box office, it appears that Defendants' decision to limit the marketing and distribution of *Breaking Wind* to the Z Market was based on factors unrelated to economic incentive.

654. Defendant's own (claimed) entry into the "Z Market," *Breaking Wind*, has received NO reviews from critics at all on Rottentomatoes.com, and only 20% audience approval from users (based on a scant 365 audience reviews). The fact that no reviews have been provided by any critic – mainstream or otherwise - demonstrates that Defendants entered *Breaking Wind* into the "Z Market" in bad faith and with no intention to market and promote its own movie to the public.

655. Defendants' release of *Breaking Wind* to a very limited audience (R Rating, limited theatrical release in foreign markets, direct-to-DVD in the United States with no

advertising or promotion or mainstream critical reviews) was intended by Defendants as a preemptive measure to conceal its own anticompetitive conduct and maintain its monopoly in the antitrust “Z Market.” In other words, LIONSGATE “dumped” *Breaking Wind* into the distribution chain not because Defendants thought the film would make audiences laugh or because Defendants intended to promote or profit large margins from it.

656. Rather, Defendants released *Breaking Wind* as a means to intentionally foreclose and destroy ALL competition in the “Z Market.” By virtue of LIONSGATE’s single “Z Market” entry, LIONSGATE intended to box out prospective filmmakers and distributors from releasing “Z Market Products” that spoofed *The Twilight Saga* on grounds that the “Z Market” space was already “occupied” by Defendants’ own “derivative work,” i.e., *Breaking Wind*. Defendants conceded its specific anticompetitive intent in writing⁹⁴ on April 13, 2013 when its sophisticated counsel last wrote to Plaintiff:

“[Y]ou point out that Summit’s parent company, Lions Gate Entertainment, has released the film *Breaking Wind*. Such film is obviously authorized by Summit, and therefore, non-infringing unlike *Between the Lines’ Twiharder* film. The fourth [Fair Use] factor “must take account not only of harm to the original, but also of harm to the market for derivative works.” See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994), citing *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 568 (1985). **Between the Lines Productions is trying, without authorization, to enter a market already occupied by an authorized derivative work of the *Twilight* films. This constitutes a significant harm to Summit. [Ex. A (BTL_000043)]**

657. Beginning in June 2012 and continuing through the present, Defendants’ exclusion of Plaintiff’s *Twiharder* from the “Z Market” has been based in part upon *Breaking Wind*, a LIONSGATE movie that received the absolute bare minimum of marketing or

⁹⁴ Courts may infer anticompetitive behavior from a defendants’ words. *Tops Mkts. Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 101 (2d Cir. 1998) (finding specific intent to monopolize where “[d]efendants’ officials frequently affirmed their stated goal of preventing [plaintiff] from entering the ... market”).

promotional support from a billion-dollar company.

658. Moreover, Defendants excluded Plaintiff from the “Z Market” even though Defendants did not have any other “Z Market Products” scheduled to be released to the U.S. marketplace concurrent with the theatrical release of *The Twilight Saga: Breaking Wind Part 2* in November 2012, nor at any time thereafter.

659. Defendant released *Breaking Wind* in January 2012 merely as a strategic “placeholder” to freeze out ALL prospective competitors from entering the “Z Market” and thereby maintain its monopoly.

660. Defendants’ anticompetitive conduct is therefore inconsistent with the purpose of the Copyright laws, which is to provide economic incentives to authors to create expressive works without fear of market displacement of the original work.

661. Even if *Breaking Wind* was a legitimate movie release in January 2012 in conjunction with *The Twilight Saga: Breaking Dawn Part 1* in November 2011, it does not immunize Defendants from liability under Section 2 of the SHERMAN ACT for intentionally destroying Plaintiff’s opportunity to release *Twiharder* to the “Z Market” in a timely and relevant manner so as to coincide with Defendants’ theatrical release of *The Twilight Saga: Breaking Dawn Part 2* – a separate motion picture - in November 2012.⁹⁵

(5) INTENT TO SUPPRESS ARGUMENTATIVE SPEECH VIA “MORAL RIGHTS:

662. Defendants’ intent to acquire and maintain monopoly power in the “Z Market” is to avoid public insult to its own moral sense of dignity as the creator of *The Twilight Saga*

⁹⁵ United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (holding that even where a firm attains monopoly power through legitimate conduct, e.g., through product innovation, it can subsequently violate Section 2 if it engages in anticompetitive conduct to maintain its market position).

franchise.⁹⁶

663. Aristotle, the chief founding figure in Western philosophy, proclaimed: “Dignity does not consist in possessing honors, but in the *consciousness* that we deserve them.”

664. In accordance with Aristotle’s sage philosophy, the U.S. Constitution does not grant Defendants the proprietary or pecuniary right to legally assert its subjective, moral view of the world against other citizens of the Union who adopt contrary views.⁹⁷

665. Consistent with this bedrock principal of American government, this nation’s Copyright laws have NEVER served as a means for a statutory rights holder to suppress antagonistic speech in order to shield themselves against some *perceived* injury to the author’s personal dignity.

666. Defendants have willfully excluded Plaintiff from disseminating *Twiharder*, a pure exercise of American free expression, to criticize what Defendants subjectively characterize as “the essential, intrinsic and well-known wholesomeness of *The Twilight Motion Pictures*.” [Ex. A (BTL_000034)].⁹⁸

667. Defendants’ intent to enforce their statutory rights against Plaintiff based on what Defendants subjectively perceive to be “the well-known wholesomeness of the *Twilight*

⁹⁶ See 3 MELVILLE B. NIMMER & DAVID NIMMER, NMMER ON COPYRIGHT § 8D.02[D][4], at 8D-26 n.106 (1999) (“**the issue of moral rights implicates fundamental concerns about human dignity**”); Ariel L. Bendor, *Prior Restraint Incommensurability, and the Constitutionalism of Means*, 68 FORDHAM L. REV. 289, 324 n.197 (1999) (“A moral right, in the context of intellectual property, is the right of a creator to control his creation so that it will not be changed or distorted in a way that may injure his dignity.”) (citing Susan P. Liemer, *Understanding Artists Moral Rights A Primer*, 7 B.U. PUB. INT. L.J. 41,44 (1998)).

⁹⁷ *Hutchinson v. Lause*, 672 F. Supp. 43,45 (D.P.R. 1987) (“[P]laintiff claims that... his dignity has been damaged. The Constitution of the United States, however, does not contain such bald protection[].”); Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 Wash. & Lee L. Rev. 795, 797 (2001) (“American courts have yet to announce a judicial recognition of a dignity right.”) [<http://scholarlycommons.law.wlu.edu/wlulr/vol58/iss3/3>]

⁹⁸ Taken literally on their word, Defendants’ sophisticated IP counsel has not only stated that *Plaintiff’s* copyrighted work violates Defendants’ purported trademarks through dilution under the Lanham Act, but has also asserted that Plaintiff’s motion picture *Twiharder* infringes Defendants’ copyrights because, as a tangible fixation of their own sense of morality, Defendants’ vampire-romance movies are “essential,” “intrinsic” and “wholesome” whereas Plaintiff’s copyrighted work is not.

Motion Pictures” has been manifested by their willful destruction of ALL competition in the “Z Market.”

668. Defendants leveraged their copyright monopoly and dominant market position as a means to suppress the opposing viewpoints of independent filmmakers, such as Plaintiff here, who Defendants deemed “unauthorized” to speak.

669. Defendants’ heavy reliance on its own perception of “the well-known wholesomeness” of *The Twilight Saga* motion pictures in order to deprive Plaintiff (and its individual members Gearries and Sean) of their First Amendment rights to freely exchange ideas and original expression with the marketplace is particularly foreboding in this matter given that *The Twilight Saga* has been the repeated object of sociopolitical criticism and serious academic debate amongst, *inter alia*:

- (a) parents’ organizations concerned about the mature themes and depictions of graphic violence being projected to young children;
- (b) women’s rights activists and domestic violence educators concerned about the abusive relationship depicted in Defendants’ films; and
- (c) civil rights activists and cultural historians concerned about the one-dimensional portrayal of Native Americans and other peoples of color who are typecasted throughout *The Twilight Saga* to reinforce obsolete stereotypes that have zero utility in modern American society.

670. Given the marked absence of Defendants’ true economic incentive to enter the “Z Market,” amongst other factors, Defendants’ allegations of copyright infringement against Plaintiff in its C&D Campaign amount to *mere pretext*.

671. Defendants have used patently frivolous copyright infringement allegations to mask Defendants’ intent to acquire and maintain a monopoly in the “Z Market” for the unlawful purpose of suppressing antagonist or argumentative speech that Defendants have unilaterally deemed objectionable.

672. Defendants' own hyper-amplified sense of moral authority cannot provide legitimate justification for curtailing the free exchange of ideas in the public marketplace, particularly in the medium of motion pictures which the U.S. Supreme Court has noted have the potential to influence public thought, attitudes and behavior.⁹⁹

⁹⁹ Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501, 72 S.Ct. 777, 780 96 L.Ed. 1098 (1952).

COUNT IV

DECLARATORY JUDGMENT

INVALIDATING PROVISIONS OF THE COPYRIGHT ACT OF 1976 AS UNCONSTITUTIONALLY OVERBROAD AND VOID FOR VAGUENESS WITH RESPECT TO FEATURE LENGTH “MOTION PICTURES” AND LITERARY WORKS CREATED WITH THE COMEDIC INTENT TO PARODY, MOCK, SATIRE OR CARICATURE ANOTHER FEATURE-LENGTH “MOTION PICTURE”

A. PLAINTIFF’S STANDING

(1) CASE OF ACTUAL CONTROVERSY

673. On or about June 27, 2012, and continuing through the present, Defendants have alleged that Plaintiff: (a) infringed its copyrights to the motion pictures “*Twilight*,” “*The Twilight Saga: New Moon*,” and “*The Twilight Saga: Eclipse*”; and (b) cannot claim “Fair Use” to copyright infringement pursuant to Section 107 of the COPYRIGHT ACT OF 1976.

674. Defendants’ allegations have created a “case of actual controversy” within this Honorable Court’s original jurisdiction pursuant to 28 U.S.C. § 2201 and Plaintiff may therefore seek a declaration of “the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”

675. Pursuant to 28 U.S.C. § 2202, “[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.”

(2) CONSTITUTIONAL QUESTION

676. The case at bar presents substantial constitutional questions arising under the First Amendment to the Constitution of the United States.

677. The guarantee of freedom of speech reflects “a profound national commitment. . .

that debate on public issues should be uninhibited, robust, and wide-open.”¹⁰⁰

678. According to the U.S. Supreme Court, “expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.”¹⁰¹

679. “Since ... motion pictures . . . are protected forms of expression, ... any restriction upon their dissemination must be carefully tailored in order to ensure full protection of first amendment rights.”¹⁰²

680. Congress has permitted Defendants to abridge Plaintiff’s First Amendment right to market and distribute its original motion picture *Twiharder* based on an unconstitutionally broad construction of federal statutory language set forth in the COPYRIGHT ACT OF 1976.

681. Plaintiff therefore seeks to challenge the constitutionality of certain provisions of the COPYRIGHT ACT OF 1976, namely parts of Section 101, Section 106(2) and Section 107, as overbroad and void for vagueness.

682. Plaintiff seeks a narrow construction of the Copyright Act of 1976 specifically with respect to feature-length film parodies *and/or* primary source material that is independently created *without* the wholesale replication of or digital sampling from a pre-existing work *and/or* speech content that is intrinsic in nature and which does not predominately serve to propose a commercial transaction separate and apart from the audio-visual content on display (i.e. commercial advertising). Plaintiff’s copyrighted work *Twiharder* fits within any and all of these aforementioned characterizations.

¹⁰⁰ New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (Brennan, J.).

¹⁰¹ Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502, 72 S.Ct. 777, 781, 96 L.Ed. 1098 (1952).

¹⁰² St. Martin’s Press, Inc. v. Carey, 440 F.Supp. 1196, 1204 (S.D.N.Y. 1977).

(3) MATTER OF GREAT PUBLIC INTEREST

683. The U.S. Supreme Court has noted that motion pictures are a particularly valuable form of free speech because they “may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.”¹⁰³

684. Plaintiff avers that the First Amendment rights of independent filmmakers are paramount to maintaining the American ideals of 1789 and must be vehemently protected to avoid a consolidation of monopolistic power that may seek to limit the number of dissenting viewpoints in the marketplace of ideas.

685. Because the American media / publishing industry has experienced an unprecedented consolidation of power over the course of the last decade, coupled with high levels of foreign media ownership in traditional U.S. business concerns, the Government’s need to protect the American People’s voice from suppression in mainstream media - such as the theatrical motion picture industry - is more urgent than ever.

B. OVERBREADTH

(1) STANDARD FOR CONSTITUTIONAL CHALLENGE

686. The First Amendment commands: “Congress shall make no law . . . abridging the freedom of speech . . .”¹⁰⁴

687. “As a general principle, the First Amendment bars the government from dictating

¹⁰³ Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501, 72 S.Ct. 777, 780 96 L.Ed. 1098 (1952).

¹⁰⁴ U.S. CONST. amend I.

what we see or read or speak or hear.”¹⁰⁵

688. “The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere.”¹⁰⁶

689. “In a facial challenge to the overbreadth and vagueness of a law, a court’s first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.”¹⁰⁷

690. Where the language of the federal statute challenged is deemed overbroad, the Court should construe the statute to avoid constitutional problems if the statute is subject to such a limiting construction.¹⁰⁸

691. If the federal statute is not subject to a narrowing construction and is impermissibly overbroad, it nevertheless should not be stricken down on its face; however, if it is severable, then only the unconstitutional portion is to be invalidated.¹⁰⁹

(2) OVERBROAD STATUTORY LANGUAGE

692. Plaintiff identifies the following language of Section 101 of the COPYRIGHT ACT OF 1976, as amended (“Section 101”), which defines a “derivative work” as “*a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment,*

¹⁰⁵ The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.” Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd., 502 U. S. 105, 127 (1991) (Kennedy, J., concurring).

¹⁰⁶ Ashcroft vs. Free Speech Coalition, p. 244.

¹⁰⁷ See Jodbor Cinema, Ltd. v. Sedita, 309 F. Supp. 868, 877 (W.D.N.Y. 1970) (Finding overbreadth language is “so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability.”) (citations omitted).

¹⁰⁸ New York v. Ferber, 458 U.S. 747, 769, 102 S. Ct. 3348, 3361, 73 L. Ed. 2d 1113 (1982); Crowell v. Benson, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932).

¹⁰⁹ United States v. Thirty-Seven Photographs, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971).

condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a ‘derivative work’” as being unconstitutionally overbroad to the extent such statutory definition is constructed to include comedic works of parody, travesty, burlesque, satire, farce, caricature, mock heroic, or mock epic which target a copyrighted work as the object of criticism through imitative reference (as opposed to wholesale replication or digital sampling from the copyrighted work).

693. Specifically, for purposes of the case at bar, the following words contained within the statutory definition of a “derivative work” under Section 101 are unconstitutionally overbroad for the reasons stated in this Complaint: *“fictionalization,” “motion picture version,”* and *“or any other form in which a work may be recast, transformed or adapted.”*

694. Plaintiff identifies the statutory language of Section 106(2) of the COPYRIGHT ACT OF 1976 (“Section 106(2)”) which grants a copyright owner exclusive rights to *“prepare derivative works based upon the copyrighted work;”* as being unconstitutionally overbroad with respect to a copyright owner’s preparation of a “motion picture” or “audio-visual work” that intends to parody, mock or ridicule the work of the exclusive rights owner.

695. Plaintiff identifies the following language of Section 107 of the COPYRIGHT ACT OF 1976, which provides for a defense of Fair Use as against a claim of copyright infringement, as being unconstitutionally overbroad to the extent such statutory language is constructed to include feature works of parody, travesty, burlesque, satire, farce, caricature, mock heroic, or mock epic which target a copyrighted work as the object of criticism through independent simulation and/or imitative reference:

“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or

research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

(3) COPYRIGHT MONOPOLY CANNOT EXTEND TO FEATURE PARODY

696. Plaintiff avers that by permitting a copyright holder of a serious dramatic motion picture to own the exclusive right to make a parody of its own dramatic work (absent a judicial determination of Fair Use under Section 107), Congress has deprived the public marketplace of the “best parody” to excite laughter and to provoke critical thought concerning matters of general interest surrounding the public exhibition of the targeted dramatic work

697. If the federal statute is broadly constructed to include comedic works of parody within the exclusive rights granted to the copyright owner, then an inherent conflict-of-interest is created that functions to abridge the free exchange of ideas in the marketplace.

698. Plaintiff respectfully avers that there can be no creative spark or artistic motivation for an author of a dramatic motion picture to prepare a work parody that effectively mocks and ridicules the very form of self-righteous expression that the original author intended to convey.

699. Even where the author commissions or authorizes a parody of its own work, the creative process is inherently tainted by the conflict-of-interest between the author’s original proposition, i.e., the dramatic work, and the parodist’s dissenting treatment of such proposition.

700. The COPYRIGHT ACT OF 1976 impedes rather than promotes the “useful Arts” with respect to work parody - and similar rhetorical devices of the comedic arts - resulting in a chilling effect on the freedom to create quality works of expressive art that “defamiliarize” audiences with popular culture phenomena such as *The Twilight Saga*.

701. A broad construction of these statutory provisions abridge the freedom to engage in a substantial amount of lawful speech, namely the creation, production, sale and distribution of original, full-length motion picture works which employ the classical rhetorical devices of parody, travesty, caricature, farce, mock heroic, mock epic and burlesque to lampoon a copyrighted “motion picture” that presents itself to the public in serious manner.

(4) PRESUMPTION OF INFRINGEMENT

702. By enacting the Copyright Act of 1976, Congress has declared a significant universe of protected speech content to be presumptively illegal. The inclusion of work parody without the scope of Section 107 flips the First Amendment on its head by forcing the parodist to prove that his independent creation would serve the public interest.

703. Under the current statutory scheme enacted by Congress, the doctrine of Fair Use does not grant to the parodist any legal right to simulate or reference any element of a pre-existing copyrighted work. In other words, a parody is not presumed to be a Fair Use.

704. Under its present codification, Fair Use is an equitable, affirmative defense and the burden of proving it thus rests on the parodist.¹¹⁰

705. Rather, because a work parody must rely on identifiable references to the targeted work (in order to excite laughter), it is treated by Congress as a “substantial taking” and therefore constitutes a presumptively infringing work.

¹¹⁰ See 3 NIMMER ON COPYRIGHT § 13.05; H.R. REP. No. 94-1476, 94th Cong., 2d Seas. 65, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5659, 5679 (Fair use “is an equitable rule of reason...”)

706. Once a work is determined to be a parody - and therefore infringing - the four factors are considered to determine whether it constitutes a Fair Use.¹¹¹

(5) TIME, PLACE AND MANNER RESTRICTIONS

707. This case demonstrates how the “limited monopoly” power granted by the COPYRIGHT ACT OF 1976 can be leveraged by global media conglomerates – at virtually no expense - to deprive independent American filmmakers of their First Amendment right to *timely* challenge the messages underlying popular marketing brands that are powered by a series of highly visible motion pictures.

708. As noted by Erica George, Staff Member of the Berkman Center for Internet & Society at Harvard Law School, the power of a rights holder to transmit a “cease-and-desist” letter to an alleged infringer who has created a distorted imitation of the original work is akin to a “*de facto* enforcement of otherwise unprotectable moral rights.”¹¹²

709. The paradox of the Copyright Act’s treatment of parodies is that the current statutory scheme functions to deprive the public marketplace of a *timely* discourse as to whether the work parody has value in relation to the “motion picture” targeted for criticism. The rationale behind such public deprivation is that work parody is “taking” identifiable elements from a pre-existing work which will somehow diminish the marketplace for the pre-existing work. But by the time the matter of Fair Use gets litigated, Courts find that whether a derivative work is sufficiently transformative is a matter for the marketplace to decide in the first instance.

¹¹¹ Tin Pan Apple, Inc. v. Miller Brewing Co., 737 F. Supp. 826, 829 (S.D.N.Y. 1990).

¹¹² See Erica George, *Playing in Someone Else’s Sandbox: A Legal and Cultural Overview of Fanfiction*, Harvard Law Committee on Sports & Entertainment Law, Briefing Book: Signal/Noise 2k, p. 35. (April 8, 2005) (“In many cases where copyright holders request or demand that fanfiction writers stop their reuse, **the core complaint seems to be less about the technicality of copyright infringements, and more about a desire to maintain control over the public image of a creation.** In some countries, this concern is written into the law as “moral rights” that grant original creators the right to prevent others from distorting their works in ways that might tarnish the image and good name of the creator. **US copyright law does not recognize a moral right to prevent distortion . . . The implicit threat of a lawsuit on copyright grounds provides a *de facto* enforcement of otherwise unprotectable moral rights.”).**

Thus, the statutory scheme as enacted by Congress is *entirely circular*, at least with respect to work parody, and the marketplace would occupy a much better position if there was no statutory scheme at all.

710. Although the challenged statutory language does not expressly prohibit speech content in the form of parody, *per se*, Congress' imposition of the presumption of infringement on work parody nevertheless constitutes a form of unlawful prior restraint on the Plaintiff's exercise of its First Amendment rights by virtue of the owner's *de facto* enforcement right.¹¹³

711. By shifting the burden on the author of work parody to prove that his output is "Fair Use", Congress has effectively imposed time, manner and place restrictions on the dissemination of speech content that targets a pre-existing work as the object of criticism.

712. By imposing an automatic presumption of civil liability on the parodist filmmaker from the moment of authorship, the challenged provisions of the Copyright Act function as prior restraint on mass publication of opposing viewpoints to matters of general public concern.

713. The Congressional purpose to extend the common law doctrine of Fair Use beyond secondary source material such as academic scholarship and news reporting is to promulgate indirectly what Congress knows it cannot do directly—abridge the free speech of independent artists whose contributions to society function to advance dissenting viewpoints about matters of public concern through classic rhetorical devices of the comedic arts: parody, travesty, satire, farce, mock heroic, mock epic, burlesque or caricature.

714. These rhetorical modes of discourse, which historically served as a means to build resistance against tyrannical rule in the Western world, are essential to the marketplace of ideas. The freedom to exchange in divergent speech content is vital to a system of government

¹¹³ Any prior restraint on expression carries "a heavy presumption against its constitutional validity." New York Times Co. v. United States, 403 U.S. 713, 713 (1971).

that rests upon the ideas of 1789.

715. The challenged provisions of the COPYRIGHT ACT of 1976, as drafted, are antithetical to Congress' constitutional mandate to promote the useful Arts because they discourage the creation and distribution of a broad class of expressive works which by their nature represent dissenting viewpoints on matters of public concern.

716. Prospective authors of parodical material - such as Plaintiff here - cannot determine whether the requirements of the statute are violated, thereby preventing authors from creating their work parody or conforming their conduct to the proscriptions of the statute. This, in turn, enables the copyright monopolist - such as Defendants here - to exploit the uncertainty caused by the absence of an objective Fair Use standard and empowers it to arbitrarily "enforce" its exclusive rights to prepare derivative works by threat of litigation.

717. By freezing independent filmmakers out of the market, the Republic is deprived of the robust marketplace of ideas promoted by the First Amendment. The current system of copyright monopoly leveraging cannot be sustained under the jurisprudential tenets of 1789.

(6) IMITATIVE REFERENCE IS PROTECTED FREE SPEECH

718. The success of a movie depends largely upon the actors who appear in such films, i.e., "Movie Stars."

719. The commercial success of *The Twilight Saga* movie franchise is a star vehicle driven by its three main actors: Robert Pattinson, Kim Stewart and Taylor Lautner. These young Hollywood actors are by far the most recognizable elements of Defendants' series and appear prominently in almost all of the Defendants' trailers and promotional materials.

720. In the context of "motion pictures," the work of the parodist necessarily entails that *different* actors will be utilized to simulate those individuals who appear in the targeted work.

721. Neither Robert Pattinson, Kristen Stewart nor Taylor Lautner appear in the motion picture *Twiharder*.

722. An ordinary observer could not reasonably believe that Robert Pattinson, Kristen Stewart nor Taylor Lautner appear in the motion picture *Twiharder*.

723. Plaintiff has a First Amendment right to select its own actors in the creation of a parody to caricature the actors appearing in the pre-existing work targeted for criticism.

724. Works of parody are, by their nature, “virtual,” “analogue” or “simulated” depictions of the targeted work, but do NOT actually “copy” or technically “use” material from the targeted work.

725. The challenged statutory provisions impose a presumption of federal infringement liability against the authors of work parody that only appear to depict actors from a pre-existing motion picture but were in reality independently produced without employing any of the actual actors from the targeted work.

726. Congress makes overbroad assumptions that function to prohibit the distribution of original motion pictures that merely allude or reference to pre-existing works without any digital expropriation of the audio-visual wave samples or verbatim replications of the screenplay featured in the targeted work.

727. By imposing the presumption of infringement upon the Plaintiff-comedic parodist, Congress has placed a prior restraint on the publication, distribution and sale of a broad class of motion pictures which do not depict the actual performances of the *Twilight Saga* movie actors featured in pre-existing copyrighted works.

728. The challenged provisions function to abridge the freedom of speech by extending copyright infringement liability to virtual simulations or analogue depictions rather than limiting liability to acts of actual counterfeiting or piracy.

729. Parodies must be deemed outside the proscriptions of the Copyright Act of 1976, and/or cannot be subject to the Fair Use standard because there is no actual “use” of the actors portrayed in the earlier work.

(7) NO COMPELLING STATE INTEREST TO IMPOSE PRESUMPTION OF INFRINGEMENT

730. Under the commerce clause, Congress has a legitimate governmental interest in curbing the counterfeiting and piracy of a copyrighted “motion picture” by a defendant who is not a creator of any derivative “motion picture version,” but who is instead merely engaged in the trafficking of what amounts to stolen commercial goods. This is because a counterfeiter has no conceivable colorable claim of a fundamental constitutional right to replicate the work and sell it on the open market.

731. In contrast, there is no compelling state interest to justify abridgement of First Amendment rights contemplated by application of the Fair Use doctrine to original works of artistic *comedic* expression that offer dissenting or critical viewpoints about a famous *dramatic* work.

(8) LESS DRASTIC ALTERNATIVES AVAILABLE

732. The challenged provisions of the Copyright Act of 1976 are unconstitutional because they abridge the freedom to engage in a substantial amount of lawful speech.

733. Congress need only look to its treatment of musical recordings under the Copyright Act of 1976 to resolve the conflict presented by the statute’s current overbreadth with respect to motion pictures.

734. In the world of music, any musician can “cover” a song written by a prior composer and recorded by a prior vocalist. However, a cover song does not expropriate the actual sound recording but instead tracks the underlying composition and presents it in a novel

and unique way, thereby enriching the marketplace and providing additional choice to consumers.

735. With respect to work parody, Congress can implement a mandatory licensing scheme such as the one administered by ASCAP and BMI for music performances which would require the parodist to exchange income potential, i.e., pay a compulsory licensing fee, for simulating the targeted work. This logical system would preserve the economic incentive of the dramatic filmmaker to produce serious fare while at the same time eliminating the prior restraint on free speech that currently burdens the parodist.

C. VOID FOR VAGUENESS

(1) STANDARD FOR CONSTITUTIONAL CHALLENGE

736. A federal statute is impermissibly vague when it “delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”¹¹⁴

737. A statute is vague where it “does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press”¹¹⁵

738. Here, the Fair Use doctrine as applied to a full-length feature parody motion picture and literary work is void for vagueness and unenforceable because it is simply too vague for the average citizen to understand. In other words, an average citizen seeking to create a work parody cannot generally determine what “fair uses” are regulated, what speech content is prohibited, or whether or not infringement liability may be imposed.

¹¹⁴ Grayned, supra, 408 U.S. at 108-109, 92 S.Ct. at 2299, 33 L.Ed. 2d at 228

¹¹⁵ Thornhill v. Alabama, 310 U.S. 88, 97, 60 S.Ct. 736, 741, 84 L.Ed. 1093 (1940)

739. The Fair Use doctrine, as codified by Congress in the COPYRIGHT ACT OF 1976, is impermissibly vague based on a review of all possible applications to full-length motion picture parody that targets a pre-existing work.

(2) VAGUE STATUTORY LANGUAGE

740. Plaintiff identifies the following language of Section 107 of the COPYRIGHT ACT OF 1976, as amended (“Section 107”) which provides for a defense of Fair Use as against a claim of copyright infringement as void for vagueness: “*or by any other means specified by that section [106] ... for purposes such as criticism, comment In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—*

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
- (2) the nature of the copyrighted work;*
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
- (4) the effect of the use upon the potential market for or value of the copyrighted work.*

(3) ABSENCE OF SPECIFIC GUIDELINES

741. On its face, the Copyright Act of 1976 does not provide any specific references, guidelines or resources to enable a parodist such as Plaintiff in this case to ascertain whether its full-length motion picture will be deemed Fair Use or not.

742. Congress readily concedes that the Fair Use standard provided in Section 107 is overbroad and vague.¹¹⁶

¹¹⁶ See H.R. REP. No. 1476, 94th Cong., 2d Sess. 1-2 (1976), reprinted 1976 U.S.C.C.A.N. 5659 at 5680 (House report accompanying 1976 revisions to Copyright laws) (“[b]eyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis”); see also Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977) (determination of whether use is fair requires examination of circumstances in each case), cert. denied, 434 U.S. 1013 (1978); 3 NIMMER ON COPYRIGHT, § 13-05[A] (statute does not provide rule to determine if use is fair).

743. Judicial application of the Fair Use factors outlined in Section 107 in the context of work parodies has been so variable that it renders impossible any level of predictability concerning the outcome of litigation through proper analysis of the four factors outlined in Section 107 of the COPYRIGHT ACT.

744. Although the courts have enumerated common law factors to be considered when determining the fairness of a particular use, the absence of a clear and definitive test has resulted in inconsistent application of the fair use doctrine.¹¹⁷

745. The inconsistency with which the Fair Use doctrine is applied to work parody results in arbitrary and discriminatory application.

746. There is no valid distinction in Section 107 between: (a) *secondary* sources, such as news articles, movie reviews or academic treatises, which serve to inform the public about a work of art; and (b) *primary* sources, such as “motion picture” parodies, which are novel works of art onto themselves.

747. Because the First Amendment distinguishes between the “freedom of speech” (*primary* source content) and the freedom of the press (*secondary* source content), Congress should not be permitted to conflate the primary arts of the People from the secondary comments of the Press through application of the Fair Use doctrine.

748. Plaintiff avers that to survive constitutional scrutiny under the First Amendment, the Fair Use doctrine must be narrowly constructed so as to exclude *primary* sources from the ambit of Section 107.

749. Similarly, there is no valid distinction in Section 107 between: (a) commercial

¹¹⁷ See Rodin, *Parody Protection Under the Fair Use Doctrine – The Everready Standard*, ST. JOHN’S LAW REVIEW, Vol. 66, Iss. 4 (1993) at <http://scholarship.law.stjohns.edu/lawreview/vol66/iss4/9>, p1173; see also Mazzone, Jason, *Administering Fair Use*, 51 WILLIAM AND MARY LAW REVIEW 395 (2009), Vol. 51:395 (“The failure of Congress and of the courts to provide clear guidance on the meaning of fair use permits copyright owners to leverage the vagueness of the law and persuade prospective users that virtually any unauthorized use constitutes copyright infringement-and that if the use is not paid for it will result in a lawsuit and substantial damages.”)

advertising speech, such as 30-second TV commercial spots used to promote the sale of goods and services; and (b) intrinsic speech content, such as full-length feature “motion pictures.”

750. Plaintiff avers that to survive constitutional scrutiny under the First Amendment, the definition of “derivative work” under Section 101, the exclusive rights of owner and the Fair Use doctrine under Section 107 must be narrowly constructed so as to exclude intrinsic speech content in the form of parody from the ambit of Section 107.

751. The Fair Use doctrine as embodied in Section 107 of the Copyright Act must be narrowly constructed so as to restrict its applicability to *secondary* source material and commercial advertisements – which are easily identifiable and constitutionally proscribable - but to specifically exclude *primary* source and intrinsic speech content, such as the full length “motion picture” at issue in this case.

752. Plaintiff avers that Congress’ failure to specifically exclude primary source and intrinsic speech content from the scope of Section 107 constitutes a “forbidden intrusion on the field of free expression.”¹¹⁸

(4) ABSENCE OF STATUTORY REFERENCE TO “PARODY”

753. On its face, Section 107 does not specifically refer to “parody,” nor any of the other parallel rhetorical modes of discourse within the comedic arts, including “travesty,” “satire,” “farce,” “mock heroic,” “mock epic,” “burlesque,” “extravaganza” or “caricature,” all of which entail imitative references to pre-existing works to make their humorous point.

754. On its face, the Fair Use doctrine provides no objective basis for enforcement of the copyright laws with respect to the work parody at issue in this case.

755. Instead of citing to any statutory language, the federal judiciary has since 1976 bootstrapped work parody into the four-factor analysis of Section 107 through mere comments

¹¹⁸ New York Times Co. v. Sullivan, 376 U.S. 254, 285, 84 S.Ct. 710, 728, 11 L.Ed.2d 686 (1964).

made in the House report accompanying 1976 revisions to U.S. copyright laws.¹¹⁹

756. Section 107 fails in all of its possible applications to advise prospective copyright authors of reasonable intelligence of the standard of conduct being proscribed.

757. The inability of independent filmmakers to determine whether the “Fair Use” standard set forth in Section 107 is applicable to a work parody “motion picture” is the same as having no standard at all.

758. On its face, the statute fails to provide an ascertainable standard for determining whether a parodist’s imitative references to themes, characters, concepts, or ideas displayed in a pre-existing work shall constitute a “Fair Use.”

759. Congress has failed to provide any direction to prospective copyright authors by setting forth standard references, guidelines or resources involving the “Dos and Dont’s” of work parody creation.

(5) SELECTIVE JUDICIAL ENFORCEMENT

760. The entire scope of the Fair Use doctrine as embodied in Section 107 of the Copyright Act of 1976 - and as used by the judiciary in all applications to an expressive work that does not in and of itself propose a commercial transaction - is subject to the uncertainties and vagaries of subjective value judgments concerning the artistic merit of intrinsic speech content.

761. Enforcement of the challenged provisions is arbitrary and capricious because Congress has improperly provided an *ad hoc* standard enabling the federal judiciary to engage in qualitative, subjective value judgments about intrinsic speech content. In doing so, Congress has usurped the role of the marketplace to render such decisions.

¹¹⁹ H.R. REP. No. 1476, 94th Cong., 2d Sess. 1-2, at 66 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5678 (The legislature commented that an appropriate consideration for fair use would be **the “use in a parody of some of the content of the work parodied”**).

762. Members of the federal judiciary - as individual constituents of the consumer marketplace - certainly have the human capacity to make value determinations concerning the artistic output of the parodist. However, Plaintiff respectfully avers that judicial intervention into matters of speech content valuation strains the function and original jurisdiction of the Courts, which are not expressly vested with the original authority to make value determinations on artistic merit under the Federal Judiciary Act of 1789.

763. The challenged provisions are particularly dangerous to the core ideals of 1789 jurisprudence because they permit government officials to assess the market value of works of art that may be encoded with *political* speech.

764. The marketplace, consisting of ordinary observers, is intelligent enough to decide which artistic offerings have value and which artistic offerings do not without the need for judicial intervention.

765. Likewise, an ordinary observer can be trusted to know the difference between a parody and a serious dramatic work without the need for judicial intervention.

766. The Government's role is not to decide what speech may be offensive to the marketplace.¹²⁰

767. If the market is flooded with films that target *The Twilight Saga* and its enthusiastic teenage fan base as the subjects of comedic ridicule, it is only because the market has demanded to see such films. If the market grows bored of such fare and shows its indifference at the box office, then parody filmmakers will transition to other subjects to capture an audience.

¹²⁰ Ashcroft vs. Free Speech Coalition, p. 244. (“It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities.”); FCC v. Pacifica Foundation, 438 U. S. 726, 745 (1978) (“[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it”); Carey v. Population Services Int’l, 431 U. S. 678, 701 (1977) (“[T]he fact that protected speech may be offensive to some does not justify its suppression”).

(6) “COMMERCIAL [AD] SPEECH” VS. “FOR-PROFIT SPEECH”

768. The idea of “commercial speech” was first introduced by the U.S. Supreme Court in *Valentine v. Chrestensen* (1942) (in upholding a regulation, the Supreme Court stated “We are . . . clear that the Constitution imposes . . . no restraint on government as respects purely commercial advertising.”).

769. Using the U.S. Supreme Court’s 1942 definition, the Plaintiff’s full length copyrighted “motion picture” does not fit the definition of “commercial speech” because the work parody itself is not a form of advertising that proposes a commercial transaction for the sale of goods or services.

770. Section 107(1), the first factor in the Fair Use test, specifically refers to the amorphous phrase “commercial nature” of an alleged infringer’s fair use of a copyrighted work. This phrase is highly confusing to ordinary citizens, judges and lawyers alike. This is because all speech, if fixed in a tangible medium, can be construed as “commercial,” even if used in an educational or academic setting.¹²¹

771. If words are placed into the “marketplace of ideas,” they are by definition commercial. This does not mean, of course, that such words constitute *commercial advertising*, which is the only appropriate distinction that can be made between commercial and non-commercial speech under the U.S. Supreme Court ruling.

772. Congress has ostensibly made a distinction in Section 107(1) between “*commercial nature*” and “*non-profit educational purposes*,” a dichotomy which could be construed by Courts to impose upon the parodist a highly irrational restriction that limits

¹²¹ *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert denied*, 385 U.S. 1009 (1967) (“**Whether an author . . . is motivated in part by a desire for commercial gain, or ‘whether [his publication] is designed for the popular market. . . has no bearing on whether a public benefit may be derived from such a work. . . . All publications presumably are operated for profit [B]oth commercial and artistic elements are involved in almost every work.’**”)

exhibition of work parody to the public school system or non-profit charity events.

773. To the extent that Congress seeks to draw a distinction between “for-profit” and “not-for-profit” purposes, such flawed distinction in the context of the COPYRIGHT ACT further underscores the need to narrow construction of Section 107 to preclude application of the Fair Use doctrine to work parody.

774. By using the Fair Use doctrine to conflate *secondary* sources, such as news reporting and movie reviews, with *primary* sources such as work parody, the federal statute again reveals itself to be entirely vague.

775. A parody by its very nature is intended to “wage battle” upon the targeted work. In this case, that work happens to be a box office phenomenon, *The Twilight Saga*, that resonates with audiences on a global level.

776. By imposing the presumption of infringement upon a work parody through Section 107(1), Congress has ostensibly attempted to relegate work parody to exhibition in public school systems and charity events – rather than mass market theatrical venues where the targeted work has chosen to stake its claim and disseminate its message. Such time, place and manner restrictions thereby abridge the First Amendment right of the parodist to “wage battle” against the targeted work within the realm of the original copyright owner’s chosen battlefield.

777. A “non-for-profit parody” or “scholarly parody” has no basis in economic or cultural reality; such concepts are oxymoronic by virtue of the fact that, notwithstanding its underlying social or political messages, work parody is first and foremost an expression created to excite laughter. Parody best functions as *entertainment for the masses* and thus by definition has an intrinsic profit motive.

778. Finally, provided that the audience is responsive to the work parody, it must be concluded that a parodist has just as much right to earn a living from his independently created

works as the author of the purportedly serious dramatic works being parodied.¹²²

(7) ECONOMIC BENEFITS DERIVED FROM NARROW CONSTRUCTION

779. If the federal statute is found to be constitutional as to work parody, the imposition of liability for infringement will result in unconstitutional violations of the Parodist's exercise of his First Amendment rights in every case because there can never be economic justification for excluding the work parody from the marketplace of ideas.

780. If the work parody is perceived by the marketplace as low quality speech and unworthy of serious recognition, then no harm is caused to the owner of the pre-existing work - who actually benefits from whatever publicity is gained by the distribution of the Parodist' work.

781. On the other hand, if the work parody resonates with the marketplace and becomes a "hit" in terms of both critical review and box office success, then the marketplace of ideas has been enriched by the alternative viewpoint embodied in the work parody.

782. In such case, the Parody Creator should derive the economic benefits from the fruit of his labor. Meanwhile, the copyright monopolist still received some economic benefits from the increased value of publicity generated by the market success of the work parody, and should be further incentivized to create higher quality, better produced movies that are less susceptible to public ridicule.

783. Even where the parody filmmaker successfully defends the originality of his "motion picture" against a sham prosecution by the copyright monopolist, this does NOT cure

¹²² Cardtoons v. Major League Baseball Player Ass'n, 868 F. Supp. 1266, 1268 (N.D. Okla. 1994) ("Creating a successful commercial parody of a well-known person is not as simple as creating a successful commercial counterfeit of a well-known product. A counterfeiter adds nothing to the original. **A parodist takes a person, exaggerates and distorts facets of the person until hilarity ensues, and markets the result.** The result is not the equivalent of the original: the parodist has studied the original and modified it until it is something that could never be mistaken for its progenitor. **It is reasonable that a parodist would seek compensation for his efforts, for though the parodist takes substantial inspiration from his subject, he creates something that did not exist before.**").

the initial violation of constitutional rights by the statute, which allows the copyright monopolist to swiftly repress valuable works of alternative speech based on nothing more than a “cease and desist” letter and some boilerplate citations to “fair use” cases.

784. The mere threat of litigation whose outcome cannot be reasonably determined by reference to any objective standard in Section 107 creates an automatic chilling effect on parodical speech.

COUNT V

DECLARATORY JUDGMENT

CANCELLATION OF DEFENDANTS' USPTO-REGISTERED TRADEMARKS & SERVICEMARKS PURSUANT TO 15 U.S.C. §§ 1064, 1119

A. STATUTORY LANGUAGE

785. This Count seeks cancellation of Defendants' federally registered trademarks and servicemarks pursuant to 15 U.S.C. § 1119, which provides in its entirety:

In any action involving a registered mark the court may determine the right to registration, order the cancelation of registrations, in whole or in part, restore canceled registrations, and otherwise rectify the register with respect to the registrations of any party to the action. Decrees and orders shall be certified by the court to the Director, who shall make appropriate entry upon the records of the Patent and Trademark Office, and shall be controlled thereby.

786. The Honorable Court also derives authority to cancel Defendants' challenged trademark / servicemark registrations pursuant to 15 U.S.C. § 1064, which provides in relevant part:

A petition to cancel a registration of a mark, stating the grounds relied upon, may ...be filed as follows by any person who believes that he is or will be damaged, including as a result of a likelihood of dilution by blurring or dilution by tarnishment under section 1125 (c) of this title, by the registration of a mark on the principal register established by this chapter,

(1) Within five years from the date of the registration of the mark under this chapter...

(3) At any time if the registered mark becomes the generic name for the goods or services, or a portion thereof, for which it is registered, or is functional, or has been abandoned, or its registration was obtained fraudulently or contrary to the provisions of section 1054 of this title or of subsection (a), (b), or (c) of section 1052 of this title for a registration under this chapter, or contrary to similar prohibitory provisions of such prior Acts for a registration under such Acts, or if the registered mark is being used by, or with the permission of, the

registrant so as to misrepresent the source of the goods or services on or in connection with which the mark is used.

If the registered mark becomes the generic name for less than all of the goods or services for which it is registered, a petition to cancel the registration for only those goods or services may be filed. A registered mark shall not be deemed to be the generic name of goods or services solely because such mark is also used as a name of or to identify a unique product or service. The primary significance of the registered mark to the relevant public rather than purchaser motivation shall be the test for determining whether the registered mark has become the generic name of goods or services on or in connection with which it has been used.

B. CASE OF ACTUAL CONTROVERSY

(1) DEFENDANTS' CEASE & DESIST NOTICE

787. On or about June 27, 2012, Defendants alleged in writing that Plaintiff had committed “trademark infringement ... false designation of origin and dilution [by tarnishment]” in violation of the LANHAM ACT, 15 U.S.C. § 1125. [Ex A. (BTL_000004-6)].

788. In their 6/27/12 C&D Notice, Defendants demanded under threat of civil litigation that Plaintiff “cease and desist” all use or intent to use in commerce the following elements or proprietary interests owned by Plaintiff (which shall collectively be referred to herein as the “Allegedly Infringing Materials”)

- (a) the movie title “*Twiharder*” in connection with Plaintiff’s feature-length motion picture parody (which had previously been copyrighted with the U.S. Copyright Office with the work title *Twiharder*); [Ex. B (BTL_000046)]
- (b) the graphic logo used by Plaintiff to identify the motion picture *Twiharder*; [Ex. F (BTL_000363)]
- (c) the DVD / movie poster artwork and other graphic and photographic images prepared by Plaintiff to identify the copyrighted motion picture *Twiharder* and “Between the Lines Productions” as the source of the motion picture [Ex. F (BTL_000336-341)]; and
- (d) Plaintiff’s registered and fully functional web domain (www.twiharder.com) [Ex. F (BTL_000348-359)]

789. Attached as “Exhibit B” to the 6/27/12 C&D Notice were twenty-five (25)

separate and distinct federally registered trademarks and servicemarks purportedly owned by Defendants. [Ex. V (BTL_001272-1362) (June 27, 2012)]

790. To date, despite Plaintiff's repeated requests via counsel to withdraw its untenable and false allegations, Defendants have failed to retract their claims of LANHAM ACT violations as initially charged against Plaintiff on June 27, 2012. [Ex A. (BTL_000019-23) (July 24, 2012); Ex A. (BTL_000028-29) (October 30, 2012); Ex A. (BTL_000033-35) (January 15, 2013); Ex A. (BTL_000042-43) (April 18, 2013)].

791. As recently as April 18, 2013, Defendants have continued to unreasonably demand that Plaintiff cease and desist from using or intending to use in commerce the Allegedly Infringing Materials. [Ex A. (BTL_000042-43) (April 18, 2013)].

792. Defendants' allegations of trademark infringement, false designation of origin and trademark dilution stemming from Defendants' purported registered trademarks and servicemarks have created a "case of actual controversy" within this Court's original jurisdiction pursuant to 28 U.S.C. § 2201. Plaintiff may therefore seek a declaration of "the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

793. Pursuant to 28 U.S.C. § 2202, "[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

(2) PLAINTIFF'S ECONOMIC INJURY

794. Defendants' allegations of LANHAM ACT violations against Plaintiff, as set forth in writing by Defendants' during its C&D Campaign, continue to pollute the WMPI business atmosphere in which Plaintiff operates and thereby inhibits Plaintiff from conducting business in its lawful trade and chosen field of endeavor.

795. Defendants' knowing material false allegations have therefore caused substantial economic injury to Plaintiff and have deprived Plaintiff (and its individual members Gearries and Sean) of the free exercise of constitutional rights. If left to its own predatory devices, Defendants will continue to cause injury to Plaintiff until such time as Defendants have conceded their legally untenable position, or have been ordered by the Honorable Court to stand down.

796. Having conducted due diligence into the applicable law and facts underlying Defendants' purported LANHAM ACT claims, Plaintiff recently discovered that an identifiable number of trademark and servicemark registrations on file with the USPTO Principal Register, and transmitted to Plaintiff as part of Defendants' 6/27/12 C&D Notice, were procured by Defendants through unlawful and/or improper means, specifically, via:

- (a) misrepresentations and/or omissions of material fact made by Defendants during the federal trademark / servicemark application process; and/or
- (b) unilateral mistake and/or misapprehension of statutory law or administrative regulation by an examining attorney employed by or under the control and supervision of the USPTO; and/or
- (c) mutual mistake of existing law committed by both Defendants and USPTO examining attorneys that permitted forbidden registrations of unregistrable word marks.

797. Based on the foregoing, Plaintiff has proper standing to request the Honorable Court's adjudication of the case of actual controversy set forth in this Count V of the Complaint, which in good faith seeks an ORDER from the Honorable Court to invalidate and cancel the Challenged Marks identified herein so as to preserve the integrity of the USPTO registration system, to protect the U.S. consumer marketplace from the anticompetitive effects of Defendants' continuing predatory conduct, and to relieve Plaintiff from Defendants' false and untenable allegations concerning trademark infringement, false designation of origin and trademark dilution.

C. IDENTITY OF THE CHALLENGED MARKS

(1) UNIVERSE OF VOIDABLE MARKS

798. During the course of Defendants' C&D campaign against Plaintiff, Defendants intentionally transmitted to Plaintiff a total of *twenty-five* (25) separate and distinct trademark / servicemark registration certificates, each of which were physically attached hard copy to Defendants' 6/27/12 C&D Notice as "Exhibit B" [Ex. V (BTL_001282-1301)].

799. Plaintiff identifies the 25 trademark / servicemark registrations attached as "Exhibit B" to the 6/27/12 C&D Notice as the "Universe of Voidable Marks" and hereby reserves the right to challenge the validity of all such marks upon further discovery.

800. For purposes of Count V of this Complaint, Plaintiff seeks an ORDER from the Honorable Court directing the USPTO to cancel, invalidate, and permanently revoke seven (7) federal registrations out of the Universe of Voidable Marks on legal and factual grounds specifically set forth below.

(2) "MOVIE TITLE MARKS"

801. Plaintiff identifies six (6) out of the Universe of Voidable Marks as being material to the WMPI, which is the overall area of effective competition in which Plaintiff and Defendants operate. These six (6) registrations expressly state or imply that the work titles of Defendants' copyrighted motion pictures are associated with or an integral component of the goods or services that are actually used in commerce by Defendants.

802. Accordingly, these six (6) registrations shall be collectively referred to herein as the "Movie Title Marks" and shall include: TWILIGHT '560; TWILIGHT '079; TWILIGHT '386; NEW MOON '792, NEW MOON '455, and THE TWILIGHT SAGA '682.

(3) TWIHARD '325

803. Plaintiff also identifies one (1) out of the Universe of Voidable Marks, TWIHARD '325, as being material to Plaintiff's proprietary interests in its trade because the title of Plaintiff's copyrighted motion picture *Twiharder* is a parody of the word *Twihard*.

804. TWIHARD '325 is also material to Plaintiff's interests because TWIHARD '325 is the only mark within the four corners of Defendants' 6/27/12 C&D Notice that was specifically referred to and discussed in connection with Defendants' allegations of LANHAM ACT violations against Plaintiff. [Ex A. (BTL_000004-6)].

“MOVIE TITLE MARKS”

#	MARK (type) [characters]	DATES F: Filing Date U: First Use R: Registration B: Filing Basis	REG. NO.	INTERNATIONAL CLASS [G&S Description]	EXHIBIT (Citation)
1	TWILIGHT (trademark) [standard]	F: 06-25-2008 U: 09-01-2008 R: 11-30-2010 B: 1B	3,884,386 (*386)	Class 009 Pre-Recorded DVDs and other audio-visual recordings featuring motion pictures and documentaries; Motion picture films in the fields of drama and romance.	Ex. V (BTL_001284)
2	TWILIGHT (servicemark) [standard]	(041) F: 06-30-2008 U: 04-18-2008 R: 03-09-2010 B: 1A (045) F: 06-30-2008 U: 06-01-2008 R: 03-09-2010 B: 1A	3,756,560 (*560)	Class 041 Entertainment services in the nature of on-going dramatic television programs; Production and distribution of motion pictures; Providing information relating to motion pictures, television programs and literary works. Class 045 Licensing of merchandise associated with motion pictures; Providing on-line information on the licensing of merchandise associated with motion pictures.	Ex. V (BTL_001291)
3	TWILIGHT (servicemark) [logo]	F: 10-20-2009 U: 06-01-2008 R: 07-13-2010 B: 1A	3,817,079 (*079)	Class 045 Licensing of merchandise associated with motion pictures; Providing on-line information on the licensing of merchandise associated with motion pictures.	Ex. V (BTL_001292)
4	NEW MOON (servicemark) [standard]	F: 10-28-2009 U: 01-01-2009 R: 6-01-2010 B: 1A	3,795,792 (*792)	Class 045 Licensing of merchandise associated with motion pictures; Providing on-line information on the licensing of merchandise associated with motion pictures.	Ex. V (BTL_001303)
5	NEW MOON (servicemark) [standard]	F: 10-28-2009 U: 01-01-2009 R: 1-24-2012 B: 1A	4,091,455 (*455)	Class 041 Production and distribution of motion on pictures; providing information relating to motion pictures, television programs and literary works; Providing a website featuring information on motion pictures, service mark literary works and music, online computer games.	Ex. V (BTL_001299)
6	THE TWILIGHT SAGA (servicemark) [standard]	F: 03-29-11 U: 01-01-2009 R: 08-16-2011 B: 1A	4,012,682 (*682)	Class 045 Licensing of merchandise and intellectual property associated with motion pictures; Providing on-line information on the licensing of merchandise associated with motion pictures; and providing selection of online electronic greeting cards.	Ex. V (BTL_001297)

D. REGISTRATION OF “MOVIE TITLE MARKS”

(1) TWILIGHT ‘386 [CLASS 009]

805. On or about June 25, 2008, Defendants filed a trademark application with the USPTO Principal Register, Serial No. 77-980-354, in International **Class 009** claiming to have been using the work title TWILIGHT since September 1, 2008 in connection with Defendants’ purported sale of “pre-recorded DVDs and other audiovisual recordings featuring motion pictures and documentaries, motion picture films in the fields of drama and romance and mousepads.” [Ex. C (BTL_000123); Ex. V (BTL_001284)]

806. On November 30, 2010, the USPTO registered Defendants’ mark TWILIGHT, U.S. Reg. No. 3,884,386 (‘386). [Ex. C (BTL_000123)]

(2) TWILIGHT ‘560 [CLASS 041/045]

807. On or about June 30, 2008, Defendants filed a servicemark application with the USPTO Principal Register, Serial No. 77-511-175, in International **Classes 041** claiming to have been using the single-word mark TWILIGHT in commerce since April 18, 2008 in connection with “Entertainment services in the nature of on-going dramatic television programs, production and distribution of motion pictures, providing information relating to motion pictures, television programs and literary works.” In the same application, Defendants also filed under **Class 045**, claiming to have been using the single-word mark TWILIGHT in commerce since June 1, 2008 in connection with “Licensing of merchandise associated with motion pictures; providing on-line information on the licensing of merchandise association with motion pictures.” [Ex. V. (BTL_001291; Ex. C (BTL_000124)]

808. On March 9, 2010, the USPTO registered Defendants’ servicemark TWILIGHT, U.S. Reg. No. 3,756,560 (‘560). [Ex. C (BTL_000143)]

809. Licensing pictures

(3) TWILIGHT ‘079 [CLASS 045]

810. On or about October 20, 2009, Defendants filed a servicemark application with the USPTO Principal Register, Serial No. 77-852-862, in International **Class 045** claiming to have been using the single-word servicemark TWILIGHT in a stylized font since June 1, 2008 in connection with the licensing of merchandise associated with motion pictures; providing on-line information on the licensing of merchandise associated with motion pictures, in class 045. [Ex. C (BTL_000125)]

811. On July 13, 2010, the USPTO registered Defendants’ servicemark TWILIGHT, U.S. Reg. No. 3,817,079 (‘079) [Ex. V. (BTL_001292; Ex. C (BTL_000125)]

(4) NEW MOON ‘792 [CLASS 045]

812. On October 20, 2009, Defendants filed a servicemark application with the USPTO Principal Register, Serial No. 77-859-422, in International **Class 045** claiming to have been using the term NEW MOON as a servicemark since January 1, 2009 in connection with “the licensing of merchandise associated with motion pictures; providing on-line information on the licensing of merchandise associated with motion pictures.” [Ex. C (BTL_000125); Ex. V (BTL_001303)].

813. On June 1, 2010, the USPTO registered Defendants’ servicemark NEW MOON, U.S. Reg. No. 3,795,792 (‘792) [Ex. C (BTL_000125)]

(5) NEW MOON ‘455 [CLASS 041]

814. On October 28, 2009, Defendants filed a servicemark application with the USPTO Principal Register, Serial No. 77-859-421, in International **Class 041** claiming to have been using the term NEW MOON as a servicemark in commerce since January 1, 2009 in connection with the “licensing of merchandise associated with motion pictures; providing on-

line information on the licensing of merchandise associated with motion pictures.” [Ex. C (BTL_000125)].

815. On January 24, 2011, the USPTO registered Defendants’ servicemark NEW MOON, U.S. Reg. No. 4,091,455 (‘455) [Ex. C (BTL_000125); Ex. V. (BTL_001299)]

(6) THE TWILIGHT SAGA ‘682 [CLASS 045]

816. On March 29, 2011, Defendants filed a servicemark application with the USPTO Principal Register, Serial No. 85-279-320, in International **Class 045** claiming to have been using the term THE TWILIGHT SAGA as a servicemark in commerce since January 1, 2009 in connection with the licensing of merchandise and intellectual property associated with motion pictures; and providing a selection of on-line electronic greeting cards.” [Ex. C (BTL_000126); Ex. V (BTL_001297)].

817. On August 16, 2011, the USPTO registered Defendants’ servicemark THE TWILIGHT SAGA, U.S. Reg. No. 4,012,682 (‘682) [Ex. C (BTL_000126); Ex. V. (BTL_001297)]

E. GROUNDS FOR CANCELLATION (“MOVIE TITLE MARKS”)

(1) PROHIBITED REGISTRATIONS OF SINGLE-WORK TITLES

818. Pursuant to Section 1202.8 of the Trademark Manual of Examining Procedure (“TMEP”) and consistent with over 55 years of bedrock judicial precedent, the title of a single creative work is not registrable on the U.S. Principal Register or the Supplemental Register.”¹²³

¹²³ TMEP §1202.08: TITLE OF A SINGLE CREATIVE WORK [April 2013] provides: “The title, or a portion of a title, of a single creative work must be refused registration under §§1, 2, and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052 and 1127, unless the title has been used on a series of creative works. The title of a single creative work is not registrable on either the Principal or Supplemental Register. Herbko Int’l, Inc. v. Kappa Books, Inc., 308 F.3d 1156, 1162, 64 USPQ2d 1375, 1378 (Fed. Cir. 2002) (“the title of a single book cannot serve as a source identifier”); In re Cooper, 254 F.2d 611, 615-16, 117 USPQ 396, 400 (C.C.P.A. 1958), cert. denied, 358 U.S. 840, 119 USPQ 501 (1958) (“A book title ... identifies a specific literary work ... and is not associated in the public mind with the publisher, printer or bookseller...”); In re Hal Leonard Publishing Corp., 15 USPQ2d 1574 (TTAB 1990)

819. “Single-work titles”¹²⁴ of copyrighted motion pictures are, *per se*, “inherently descriptive” or “inherently generic”¹²⁵ and thus incapable of the necessary distinctiveness for federal trademark registration.¹²⁶

820. Pursuant to TMEP, Section 1202.8 applies even if a single-work title has acquired secondary meaning, i.e., significant recognition among the public.¹²⁷ Thus, the notion that Defendants’ “A Market Products” have become well-known or “famous” carries no weight in U.S. trademark law because registration of such single-work titles are prohibited.¹²⁸

821. As the first installment of its movie franchise, Defendants released a single motion picture work entitled “*Twilight*” in November 2008. This 2008 theatrical release is the ONLY copyrighted motion picture that Defendants have released to the consumer marketplace as part of their tentpole franchise that bears the single word “*Twilight*” as the actual title of the motion picture. The remaining four installments were entitled *The Twilight Saga: New Moon* (2009); *The Twilight Saga: Eclipse* (2010); *The Twilight Saga: Breaking Dawn Part 1*; and *The Twilight Saga: Breaking Dawn Part 2* (2012). There is only one motion picture in the five-part series entitled “*Twilight*” and none of the other works in the five-part series are named

(INSTANT KEYBOARD, as used on music instruction books, found unregistrable as the title of a single work); *In re Appleby*, 159 USPQ 126 (TTAB 1968) (title of single phonograph record, as distinguished from a series, does not function as mark)

¹²⁴ See James L. Vana, *Single Work Titles and Group, Artist or Author Names—Registrability Revisited*, 88 TRADEMARK REP. 250 (1998) (source for phrase “single-work title”).

¹²⁵ See *In re Cooper*, 254 F. 2d 611, 615 (“[H]owever arbitrary, novel or non-descriptive of contents the name of a book—its title—may be, it nevertheless describes the book.”); *Herbko*, 308 F. 3d at 1164 (stating that precedent treats single-work titles as “‘inherently descriptive’ at best and ‘inherently generic’ at worst”); 2 MCCARTHY § 10:4 n.1.50 (USPTO views titles as “not just ‘descriptive,’ but ‘generic.’”).

¹²⁶ See Jonathan L. Handel, *Mark My Words*, LOS ANGELES LAWYER (April 2008) [Ex. C (BTL_000199-204)]

¹²⁷ 2 MCCARTHY § 15:2

¹²⁸ 2 MCCARTHY § 10:4

Twilight.¹²⁹ Therefore, the generic mark TWILIGHT constitutes a single creative work pursuant to TMEP 1202.08(a) is NOT registrable.¹³⁰

822. Notwithstanding these well-established (and well-known)¹³¹ trademark rules, Defendants were able to procure no less than three (3) separate and distinct servicemark and trademark registrations in connection with the 2008 single-work title motion picture *Twilight*. [Ex. C (BTL_000123; BTL_000124; BTL_000125)]

823. If registrations are viewed as mistakes, then the fact that they achieved registration has no precedential value.¹³²

824. As per the TMEP § 1202.08, the inherently generic single-work movie title “TWILIGHT” is NOT registrable under U.S. trademark law under any class of goods or services upon which Defendants’ marks were registered [I.C. 009; 041; 045]. Accordingly, TWILIGHT ‘386, TWILIGHT ‘560, and TWILIGHT ‘079 must be canceled as a matter of law.

825. Similarly, as per TMEP § 1202.08(d),¹³³ the *portion* of a single-work movie title such as “NEW MOON” (derived solely from the second installment *The Twilight Saga: New*

¹²⁹ TMEP 1202.08(c) [April 2013] (“[To establish a title as a series] [A]n applicant must submit evidence that the title is used on at least two different creative works. *In re Arnold*, 105 USPQ2d 1953, 1956 (TTAB 2013)”).

¹³⁰ TMEP 1202.08(a) [April 2013] (“Single creative works include works in which the content does not change ... Materials such as ... films are usually single creative works. Creative works that are serialized, i.e., the mark identifies the entire work but the work is issued in sections or chapters, are still considered single creative works.”)

¹³¹ See generally, Jonathan L. Handel, *Mark My Words*, LOS ANGELES LAWYER (April 2008) [Ex. C (BTL_000199-204)]; <http://digitalmedialaw.blogspot.com/2008/04/trademarking-movie-titles.html> (Cover story by Attorney Handel discussed the well-established USPTO prohibition against registration of single-work titles and explained, rather tenuously, how it was possible for IP lawyers to “circumvent – or at least, circumnavigate – the accepted doctrine”).

¹³² See *In re Nett Designs Inc.*, 236 F. 3d 1339, 1342 (Fed. Cir. 2001); *In re The Signal Cos., Inc.*, 228 U.S.P.Q. 956, 1986 TTAB LEXIS 167, at *9 n.9 (T.T.A.B. 1986) [Ex. C (BTL_000200)]

¹³³ TMEP 1202.08(d) [April 2013] (“A portion of the title of any single creative work is registrable only if the applicant can show that the portion of the title meets the following criteria: (1) It creates a separate commercial impression apart from the complete title; (2) It is used on series of works; and (3) It is promoted or recognized as a mark for the series.”)

Moon) is NOT registrable under U.S. trademark law because the mark NEW MOON is not used on every other motion picture in the five-part series and is obviously not promoted as the mark to identify the five-part series. Accordingly, NEW MOON ‘792 and NEW MOON ‘455 are not registrable under any class of services upon which Defendants’ marks were registered. [I.C. 041; 045] and must be canceled as a matter of law.

(2) PROHIBITED REGISTRATION OF MULTIPLE TITLES TO IDENTIFY SERIES

826. Despite the well-established and clearly defined USPTO rules that *prohibit* federal registration of single-work titles (TMEP § 1202.08), Defendants engaged in a pattern or practice of filing approximately 22-35 separate trademark or servicemark applications for each and every single-work title or abbreviated-single-work title that represented a singular installment in the five-part *The Twilight Saga* movie series (e.g., TWILIGHT, NEW MOON [Ex. C (BTL_000166)]; ECLIPSE [Ex. C (BTL_000166)]; BREAKING DAWN Pt. 1, BREAKING DAWN PT. 2 [Ex. C (BTL_000166)]

827. USPTO rules, TMEP §§ 1202.08(b), 1301.02(d), provide that while the title of a single work is not subject to trademark (or servicemark) registration, the title of a *series* of creative works (a “Series Title”), such as books or movies, can be registered for trademark protection.¹³⁴ [Ex. C (BTL_000200)]

828. Defendants were at all times expressly prohibited by TMEP § 1202.8 from registering any more than ONE key phrase to identify the source of its entire series (to be referred to herein as the “Source Identifier,” e.g., a recognizable series title such as *Harry Potter*, *James Bond*, *Star Trek*, *Indiana Jones*, etc.).¹³⁵ Yet, rather than registering only one Source

¹³⁴ See *In re Cooper*, 254 F. 2d 611 (C.C P.A. 1958), cert. denied, 358 U.S. 840 (1958); *Herbko Int’l. Inc. v. Kappa Books, Inc.*, 308 F. 3d 1156 (Fed. Cir. 2002); TMEP §§ 1202.08, 1301.02(d); 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 10:3, 4, 4.10, 6 (4th ed. 2004) (hereinafter “MCCARTHY”).

¹³⁵ TMEP §1202.08

Identifier for its entire vampire-romance movie series, what Defendants did here was they separately registered each of the single-work titles in the series (i.e., TWILIGHT, NEW MOON, ECLIPSE, and BREAKING DAWN) and then used each single-work title registration as a base to apply for two dozen more federal registrations using the identical wordmark.

829. Defendants were also awarded federal registrations by the USPTO with respect to marks that represented nothing more than mere portions of single-title works (“abbreviated-single-title works”), e.g., NEW MOON ‘792, NEW MOON ‘455 ECLIPSE ‘470, and BREAKING DAWN. These marks standing alone fail to identify the Series Title / Source Identifier that is *actually* used by Defendants in commerce and which are predominately displayed to the public as *The Twilight Saga: New Moon*, *The Twilight Saga: Eclipse*, and *The Twilight Saga: Breaking Dawn*, respectively. Such registrations occurred – without even being questioned by any of the USPTO Examining Attorneys assigned to the respective applications - in direct contravention of TMEP 1202.8(d).

(3) GROSS DISPARATE TREATMENT BY USPTO

830. With respect to the five (5) single-work title registrations being challenged by Plaintiff here: TWILIGHT ‘386, TWILIGHT ‘560, TWILIGHT ‘079, NEW MOON ‘792 and NEW MOON ‘455, plus the servicemark for ECLIPSE, U.S. Reg. No. 4,123,470 (‘470) (which was not attached to the 6/27/12 C&D Notice), ***the USPTO has never once issued an office action of refusal to Defendants*** - prior to publishing the applied-for mark for opposition - ***on grounds indicated by TMEP §§ 1202.08***, which expressly prohibits the federal registration of single-work titles.

831. Nor as a matter of public record did the USPTO request Defendants at anytime, with respect to any one of (at least) six (6) applications for single-title work registrations, to

clarify whether the marks Defendants applied for were being used to identify a series, rather than a single creative work within a series.

832. Nor as a matter of public record did the USPTO request Defendants at anytime, with respect to any one of (at least) six (6) applications for single-title work registrations, to submit additional specimens evidencing how NEW MOON, ECLIPSE or BREAKING DAWN - which are mere portions of single-work titles within a larger five-part series - were separable from their complete movie titles as used in the original specimens on file, e.g. *The Twilight Saga: New Moon*, *The Twilight Saga: Eclipse*, and *The Twilight Saga: Breaking Dawn*.¹³⁶

833. Plaintiff, on the other hand, filed just one servicemark application with the USPTO on the Principal Register under **Class 041** based on its movie title TWIHARDER [Ex. C (BTL_000091-96)] and was swiftly refused registration of the mark on grounds set forth in TMEP 1202.08. [Ex. C. (BTL_000099)]

834. On October 13, 2011, about three months after Plaintiff's filed the servicemark application for TWIHARDER, the USPTO issued the following statement via Office Action:

REFUSAL – TITLE OF A SINGLE WORK

Registration is refused because the applied-for mark, as used on the specimen of record, is used only as the title of a single creative work, namely the title of a specific film; it does not function as a trademark to identify and distinguish applicant's goods from those of others and to indicate the source of applicant's goods. Trademark Act Sections 1, 2 and 45, 15 U.S.C. §§1051-1052, 1127; see *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1162-63, 64 USPQ2d 1375, 1378-79 (Fed. Cir. 2002); *In re Cooper*, 254 F.2d 611, 615-16, 117 USPQ 396, 399-400 (C.C.P.A. 1958); TMEP §§904.07(b), 1202.08. Single creative works include works in which the content does not change significantly, whether that work is in printed, recorded or electronic form. TMEP §1202.08(a).

Applicant may respond to this refusal by submitting evidence that the applied-for mark is used to identify a series, rather than a single work. The name for a series of creative works indicates that each work in the series comes from the same source as the others. *In re Scholastic, Inc.*, 23 USPQ2d 1774, 1776 (TTAB 1992); see TMEP

¹³⁶ TMEP 1202.08(d)(i) [April 2013] (“If the portion of the title sought to be registered is not separable, the examining attorney must refuse registration on the ground that the mark is not a substantially exact representation of the mark as it appears on the specimen. See TMEP § 807.12(d)”)

§1202.08(c). Evidence of a series includes copies of at least two different book covers or packaging for recorded works (not two copies of the same work) that show the mark as a source identifier for the series as well as distinguish the mark from the individual titles of the works. *See* TMEP §1202.08(c). [Ex. C. (BTL_000099)]

835. Given USPTO's gross disparate treatment as between Defendants' SIX single-work title registrations (no refusals) and Plaintiff's ONE single-work title registration (immediate refusal), there is obviously one set of USPTO rules that apply to Plaintiff, an independent production company, and an entirely different set of *privileged* rules that apply to Defendants, a major movie studio.

836. Plaintiff respectfully submits that the Honorable Court cannot sustain USPTO's registrations of Defendants' Movie Title Marks without compromising the integrity of the U.S. trademark registration system. Accordingly, the USPTO's gross disparate treatment of the parties' servicemark applications should weigh in favor of canceling TWILIGHT '386, TWILIGHT '560, TWILIGHT '079, NEW MOON '792 and NEW MOON '455.¹³⁷

(4) DEFENDANTS' ACTUAL USE OF "THE TWILIGHT SAGA" AS SERIES TITLE

837. It is indisputable that Defendants have chosen the mark THE TWILIGHT SAGA as the Source Identifier / Series Title of its motion picture franchise based on Stephenie Meyer's books. The Wikipedia page for the movie franchise, which is tightly controlled by Defendants, is entitled "*The Twilight Saga (film series)*" [Ex. X (BTL_001345)], which can be distinguished from the Wikipedia page for Ms. Meyer's books which is entitled "*Twilight (series)*" [Ex. M (BTL_000669)].

838. As of May 23, 2013, Defendants have applied for a total of thirty-one (31) separate trademark or servicemark applications on the Principal Register using the identical

¹³⁷ Plaintiff would also request the Honorable Court's cancellation of ECLIPSE '470 on all of the identical grounds cited herein for TWILIGHT '560, TWILIGHT '079 and NEW MOON '792 but for the fact that Defendants did not attach the registration certificate for ECLIPSE '470 to the 6/27/12 C&D Notice transmitted to Plaintiff. It is therefore questionable whether Plaintiff has standing to make such request in this Complaint and, for that reason alone, declines to formally make such request as a part of this initial pleading.

wordmark THE TWILIGHT SAGA.

839. Of the 31 applications filed by Defendants using the identical word mark THE TWILIGHT SAGA, the USPTO has already registered a total of eighteen (18) marks bearing THE TWILIGHT SAGA on the Principal Register.

840. The earliest six (6) records of an application for the wordmark THE TWILIGHT SAGA were filed on May 6, 2009 by a third party, Hatchette Book group, Inc. (“Hatchette”). All six of these applications have been subsequently abandoned.

841. It was not until March 29, 2011, after the first three films in Defendants’ series had been released to market, that Defendant SUMMIT filed its first group of applications for THE TWILIGHT SAGA mark. On March 29, 2011, SUMMIT filed fourteen (14) separate trademark and servicemark applications.

842. Only one (1) out of the 18 trademark/servicemark applications bearing THE TWILIGHT SAGA wordmark has been asserted against Plaintiff in support of Defendants’ claims of trademark infringement, false designation of source and trademark dilution by tarnishment. [Ex. V (BTL_0001297)]

THE TWILIGHT SAGA (servicemark) [standard]	<u>Filing Date:</u> 03-29-11 <u>First Use in Commerce:</u> 01-01-2009 <u>Registration Date:</u> 08-16-2011 <u>Original Basis:</u> 1A	4,012,682 (‘682)	Class 045 <i>Licensing of merchandise</i> and intellectual property associated with <i>motion pictures</i> . Providing on-line information on the licensing of merchandise associated with motion pictures; and providing selection of online electronic greeting cards	Ex. V (BTL_001297)
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843. In its application for THE TWILIGHT SAGA ‘682, Defendants represented to the USPTO that the wordmark THE TWILIGHT SAGA was first placed into commerce in connection with licensing merchandise associated with its movie franchise and promoting its movie franchise on-line beginning January 1, 2009.

844. According to Defendants' representations to the USPTO, they started using THE TWILIGHT SAGA mark as its actual Series Title to market its movie franchise less than six (6) weeks after the theatrical debut of the first installment, *Twilight*, on November 21, 2008. Yet, incredibly, Defendants did not take steps to apply for registration of its actual Series Title until more than two years later.

845. Four (4) out of five (5) of the motion picture titles released thus far in connection with Defendants' tentpole franchise have incorporated the wordmark THE TWILIGHT SAGA. Defendants' actual use in commerce of THE TWILIGHT SAGA as the lead term to identify its feature films clearly demonstrates Defendants' manifest intent to adopt THE TWILIGHT SAGA as its true "Series Title" - rather than the inherently generic "TWILIGHT" or the abbreviated-single-work titles NEW MOON, ECLIPSE or BREAKING DAWN.

846. Accordingly, the Honorable Court's cancellation of the Challenged Movie Title Marks TWILIGHT '560, TWILIGHT '079, and TWILIGHT '386, NEW MOON '792, and NEW MOON '455 will not cause any prejudice or material detriment to Defendants who have already procured from the USPTO eighteen (18) separate trademark / servicemark registrations bearing THE TWILIGHT SAGA mark.

(5) LIKELIHOOD OF CONFUSION RE: MORE THAN ONE SERIES TITLE

847. Despite Defendants' manifest intent to use THE TWILIGHT SAGA as the Source Identifier and Series Title for its 5-feature movie franchise in actual commerce, Defendants have followed a very different strategy in its practice of applying for marks on the Principal Register. Indeed, there appears to be no less than ten (10) separate and distinct Series Titles and/or Source Identifiers related to its vampire-romance movie franchise, each of which intends

to somehow identify ONE common source.¹³⁸

848. In the context of its federal trademark / servicemark registrations, Defendants have clearly failed to choose ONE Series Title or ONE Source Identifier for its vampire-romance movie series. There is a clear disparity between: (a) Defendants' actual use of identifiable marks in commerce; and (b) Defendants' practice of accumulating dozens of distinct work titles and random trade names on the Principal Register. This disparity only begins to make sense when viewed in light of Defendants' rampant anticompetitive conduct in their IP enforcement policies, as set forth in this Complaint.

(6) "RUNNING UP THE SCORE" ON THE PRINCIPAL REGISTER

849. Defendants have applied for an *extraordinary* number of federal trademarks / servicemarks on the Principal Register relating to *The Twilight Saga* movie franchise that, on its face, appears to undermine the Congressional purpose behind U.S. trademark law, which is consumer protection. [Ex. C (BTL_000129-157)]

850. As of April 28, 2013, there were 381 records found in the USPTO principal register containing the single, inherently generic word TWILIGHT. Beginning in or about June 2008, Defendants have applied for no less than 99 records containing the ordinary English language word "twilight", including 42 separate applications for the single wordmark TWILIGHT and various other compound terms such as BELLA TWILIGHT, THE TWILIGHT SAGA, TWILIGHT BRIDAL, IMMORTAL TWILIGHT, TWILIGHT BEAUTY, NOX TWILIGHT, TWILIGHT TRACKER, LUNA TWILIGHT. Eight-three (83) out of the 99 records are "live" [Ex. C. (BTL_000159-164)].

851. The three abbreviated single-work movie title marks owned by Defendants:

¹³⁸ See, e.g., USPTO Principal Register: TWILIGHT, TWILIGHT BEAUTY, LUNA TWILIGHT, NEW MOON, BREAKING DAWN, THE TWILIGHT SAGA, ECLIPSE, TWILIGHT BRIDAL, IMMORTAL TWILIGHT, BELLA TWILIGHT. [Ex. C (BTL_000159-173)]

ECLIPSE (22 records), NEW MOON (22 records), and BREAKING DAWN (27 records), yield a total of 71 records that, given Defendants' actual use of these marks in commerce as *mere portions* of a single-work movie title within a larger series, contravenes the purpose of the TRADEMARK ACT. These abbreviated single-work marks are truly nothing more than partial titles to copyrighted motion pictures and cannot be accorded protection under the TRADEMARK ACT as a means to extend the power of the statutory monopoly granted by the COPYRIGHT ACT.

852. Defendants have also applied to the Principal Register for multiple words and phrases ostensibly associated with *The Twilight Saga* franchise, such as CULLEN, TEAM JACOB, TEAM EDWARD, TEAM SWITZERLAND, VOLTURI, and V, which yields another 60+ records. [Ex. C. (BTL_000190-196)]

853. In the course of less than five years, Defendants have applied for in excess of 230 trademark or servicemark applications on the Principal Register in connection with ONE movie franchise.

854. Defendants' conduct proves to be grossly out of proportion with Defendants' other competitors in the WMPI who are in the business of marketing movie franchises based on top-grossing films. A search of the Public Register for HARRY POTTER yields a total of 114 records for the *entire* book, movie, and merchandising franchise, which began over thirteen years ago in mid-2000 before eight blockbuster movies were released. INDIANA JONES, a mark active in popular culture for over 30 years via books, blockbuster movies, merchandising and television series, yields 43 total records. CHRONICLES of NARNIA yields only 15 records. JAMES CAMERON'S AVATAR (the highest grossing film in history) yields 11 records, not to mention "James Cameron" the auteur himself is incorporated into each mark as the Source Identifier, thus making it easy for consumers to distinguish between Cameron's motion picture and the dictionary word.

855. Defendants' strategic act of "running up the score" on the Principal Register with volumes upon volumes of trademark/servicemark applications is not consistent with the purpose of U.S. trademark laws which were enacted by Congress to permit U.S. consumers to distinguish between the quality of goods and services offered to the marketplace by various competitors. Defendants' strategy achieves the opposite effect: mass confusion as to which mark actually identifies the source of Defendants' vampire-romance movies.

856. Defendants' long-standing practice of filing extraordinarily high numbers of applications on the Principal Register relative to other competitors in Defendants' line of business demonstrates an intent to create the illusion of "strength" via government-granted privileges, rather than the actuality of high distinction in the marketplace of consumers.

857. Defendants' voluminous applications are also intended to exclude much less powerful competitors who are targeted as victims of Defendant's sham C&D tactics. In other words, by accumulating high volumes of trademark / servicemark registrations from the USPTO, Defendants' IP Counsel is able to "stuff" reams of government-stamped paperwork into envelopes which would otherwise contain nothing more than a 3-page C&D Notice.

858. In this case, on June 27, 2012, Plaintiff received a total of twenty-five (25) different trademark / servicemark registrations from Defendants, as attached to Defendants' first C&D Notice. But the C&D Notice itself, on its face, only contains one (1) specific reference to a trademark registration, namely TWIHARD '325. [Ex. A (BTL_000004-7; Ex. V (BTL_001272-76)] The content of the 6/27/12 C&D Notice primarily alleges that Plaintiff infringed on Defendant's trademark interest to use TWIHARD '325, a Class 025 registration, in connection with the sale of *clothing items*.

859. The other 24 registration certificates attached to Defendants' 6/27/12 C&D Notice, which were not specifically identified nor analyzed within the four corners of

Defendants' written C&D instrument, were clearly intended to be nothing more than "strategic paperweight" designed to create an impression of "strength through numbers."

860. Here, the public record amply demonstrates that the typical victims of Defendants' IP enforcement policy from 2009 through present day consist predominantly of independent artists, avant-garde filmmakers, parodists, documentarians, blogger / journalists, website designers, T-shirt makers, fashion designers, fan-fiction writers, and graphic artists. In the absence of any sophisticated IP counsel or a six-figure budget to litigate IP claims in federal court, such an audience could very well be intimidated by volumes of registration certificates issued by the federal government; enough at least to make any young artist STOP creating.

861. Defendants' improper use of the Principal Register is also conducted in furtherance of Defendants' monopolization (or attempt to monopolize) the "Fair Use Zones" of the "JX Market" and the "Z Market", in violation of Section 2 of the Sherman Act [Count III]. Many of the producers who target the "JX Market" and "Z Market" are members of our Nation's youth (i.e., high school / college-age / mid-20s), a creative community often full of artistic energy but low on funds who represent easy prey for dominant market players like LIONSGATE, a multi-billion dollar public company.

862. By granting *forbidden* registrations to Defendants on single-work titles such as TWILIGHT and abbreviated-single-work titles such as NEW MOON and ECLIPSE, the USPTO has done nothing more than grant the Defendants an unfettered license to suppress the freedom of expression of independent filmmakers and other artists, to literally put them out of business and demand destruction of their work product, through nothing more than a sham C&D Notice backed by *void* single-work title registrations and volumes of meaningless – albeit government-stamped - trademark registrations for such wares as bandaids [Ex. V (BTL_001295; BTL_001304)]; belt buckles [Ex. V (BTL_001290)]; chewing gum [Ex. V

(BTL_001296)]; ornamental cloth patches [Ex. V (BTL_001301)]; non-medicated lip balm [Ex. V (BTL_001302)]; candles [Ex. V (BTL_001305)]; cosmetics [(BTL_001293)]; umbrellas [(BTL_001306)]; candy [Ex. V (BTL_001300)]; aprons [Ex. V (BTL_001289)]; decorative magnets [Ex. V (BTL_001285)]; and ceramic figurines [Ex. V (BTL_001288)]. Plaintiff was not in the business of selling any of these things when Defendant targeted Plaintiff for destruction of its business.

863. Having obtained such meaningless trademark registrations to sell merchandise, Defendants leveraged these federally-granted statutory privileges to bully, harass and intimidate young, independent artists and filmmakers who had every right to exercise their voice in the pop culture conversation.

864. Plaintiff seeks herein to cancel six (6) of Defendants' Movie Title registrations, all of which directly relate to Defendants' exploitation of its *copyright* interests in the underlying motion picture content, rather than any real trademark or servicemark interest in exploiting the ancillary products and goods that can be marketed and sold to consumers outside of the Cineplex.

865. Accordingly, this factor of "running up the score" on the Principal Register weighs in favor of canceling TWILIGHT '560, TWILIGHT '079, TWILIGHT '386, NEW MOON '455, NEW MOON '792 and THE TWILIGHT SAGA '682.

(7) MOVIE TITLES ARE NOT "SERVICE PROVIDERS" [CLASS 041/CLASS 045]

866. The purpose of a servicemark is to help consumers identify and distinguish the source of a service, i.e., a service provider.

867. According to the "Explanatory Note" published on the USPTO website, International Class 041, entitled "Education; providing of training; entertainment; sporting and cultural activities . . ." "covers mainly services rendered by persons or institutions in the

development of the mental faculties of persons or animals, as well as services intended to entertain or to engage the attention.” (emphasis added)¹³⁹

868. According to the “Explanatory Note” published on the USPTO website, International Class 045, entitled “Legal services; security services for the protection of property and individuals; personal and social services rendered by others to meet the needs of individuals,” this Class “includes, in particular:

- ♦ services rendered by lawyers to individuals, groups of individuals, organizations and enterprises;
- ♦ investigation and surveillance services relating to the safety of persons and entities;
- ♦ services provided to individuals in relation with social events, such as social escort services, matrimonial agencies, funeral services.”¹⁴⁰

869. According to the USPTO, Class 041 and Class 045 may accord federal protection under the TRADEMARK ACT to services rendered and performed by *individuals or corporate entities*. These are classes intended to protect the tradename, logo, or slogan of an actual individual citizen or organized entity (sole proprietorship, LLC, S Corp., Corp, etc.) engaged in the business of providing some kind of service to other people or organizations. For example, Plaintiff Between the Lines Productions, LLC is in the business of providing film and video production services to the consumer marketplace and its tradename BETWEEN THE LINES PRODUCTIONS is therefore properly servicemarked under Class 041, U.S. Servicemark Reg. No. 4111371.

870. Motion picture single-work titles such as TWILIGHT or abbreviated-single-work titles such as NEW MOON are obviously not individuals nor corporate entities and are not, in

¹³⁹ <http://www.uspto.gov/trademarks/notices/international.jsp>

¹⁴⁰ <http://www.uspto.gov/trademarks/notices/international.jsp>

and of themselves, engaged in the business of providing any service to the public. These words and phrases are merely titles or half-titles of individual copyrighted motion pictures that, as a matter of black letter law, cannot be accorded protected under either the COPYRIGHT ACT or the TRADEMARK ACT.

871. If the USPTO has unilaterally adopted some kind of “custom and practice,” which is not otherwise authorized by any statutory law, the TMEP or the published Trademark ID Manual that permits a servicemark applicant to register motion picture titles under Class 041 or Class 045, then such “custom and practice” should be deemed unlawful by the Honorable Court particularly in cases such as this where the rights holders have systematically abused the registration privilege accorded by such “custom and practice” to unduly intimidate and harass its competitors in the marketplace, including Plaintiff.

872. Accordingly, because there is no rule that actually permits the USPTO to register a motion picture title as if such thing is an actual “service provider” under Class 041 or Class 045, the Honorable Court should weigh this ground in favor of canceling the Challenged Movie Title Marks TWILIGHT ‘560, TWILIGHT ‘079, TWILIGHT ‘386, NEW MOON ‘455, and THE TWILIGHT SAGA ‘682.

(8) “LICENSING OF MERCHANDISE” IS NOT ACCEPTABLE SERVICEMARK ID [CLASS 045]

873. According to the Trademark Acceptable Identification of Goods and Services Manual published by the USPTO on their website (the “Trademark ID Manual”), as of May 23, 2013, there are 585 possible descriptions that the USPTO considers to be acceptable identification for the source of services provided under Class 045. The “Licensing of merchandise” is NOT one of the 585 published descriptions. Nor is the “Licensing of merchandise associated with motion pictures” one of the 585 published descriptions deemed acceptable by the USPTO.

874. Further, in the cover story article published by LOS ANGELES LAWYER magazine in April 2008, entertainment attorney Jonathan L. Handel provides an exhaustive, detailed review of how to “circumvent – or at least, circumnavigate – the accepted doctrine” of the Courts and the USPTO which strictly prohibits the trademark/servicemark registration of single-work title motion picture.¹⁴¹ While Attorney Handel explains how some movie studios have managed to trademark movie titles under Class 009 and Class 041 – classes which are implicated here – there is no mention whatsoever of Class 045.

875. By utilizing Class 045 as a means to federally register a movie title as a “catch-all” goods-and-services licensing mechanism, it appears that the USPTO and/or Defendants have devised an entirely novel method to “circumvent” or “circumnavigate” the Court’s rulings, Congressional intent and the USPTO’s own published rules and guidelines.

876. Accordingly, because there is no law, published rule or regulation that actually permits the USPTO to register a motion picture title under Class 045, the Honorable Court should weigh this ground in favor of canceling the Challenged Movie Title Marks TWILIGHT ‘560, TWILIGHT ‘079, NEW MOON ‘792, and THE TWILIGHT SAGA ‘682.

(9) “TWILIGHT” IS INHERENTLY GENERIC

877. According to the MERRIAM-WEBSTER English language dictionary, “the word ‘twilight’ is a noun meaning: (1) the light from the sky between full night and sunrise or between sunset and full night produced by diffusion of sunlight through the atmosphere and its dust; or (2)(a) an intermediate state that is not clearly defined <lived in the *twilight* of neutrality — *Newsweek*>; or (2)(b): a period of decline <the *twilight* of a great career>.

878. The word “twilight” has been in common, everyday usage in the English

¹⁴¹ Jonathan L. Handel, *Mark My Words*, LOS ANGELES LAWYER (April 2008) [Ex. C (BTL_000199-204)]; <http://digitalmedialaw.blogspot.com/2008/04/trademarking-movie-titles.html>

language since the ages before Columbus set sail for the New World. Accordingly, when Defendants made the calculated business decision in 2008 to identify their tentpole franchise using nothing more than a common, single-word that could be found in the most basic of playschool dictionaries, they assumed the risk that the word “twilight” would always and forever be as GENERIC to the English language as vampires, werewolves and teen romances are to Hollywood filmmaking.

879. USPTO’s registrations of the single-work title TWILIGHT [TWILIGHT ‘079, TWILIGHT ‘386, TWILIGHT ‘792] all stand in direct contravention to TMEP § 1202.08. These prohibited registrations do not accord Defendants any proprietary rights to the dictionary word *Twilight*.

880. Accordingly, based on the inherently generic status of the common word “twilight,” the Honorable Court should cancel the Challenged Movie Title Marks TWILIGHT ‘560, TWILIGHT ‘079, and TWILIGHT ‘386.

(10) “THE TWILIGHT ZONE”

881. The final factor that weighs in favor of canceling the single word TWILIGHT Movie Title Marks [TWILIGHT ‘079, TWILIGHT ‘386, TWILIGHT ‘792] is the likelihood of long-term consumer confusion between Defendants’ single word *TWILIGHT* marks and THE TWILIGHT ZONE, an infinitely stronger U.S. registered trademark owned by CBS Studios that has been widely used in commerce for over half a century, beginning in 1959 with the debut of Rod Sterling’s legendary television series *The Twilight Zone*.

882. *The Twilight Zone*, which aired on CBS network from 1959 to 1964, can reasonably be described as a “legacy brand”, a “landmark” in American entertainment, and an iconic symbol of American cultural heritage. The Paley Center for Media recently described Sterling’s work as follows:

“*The Twilight Zone* is a legacy that continues to teach, entertain, and inspire; it is a measure of that legacy that Rod Sterling was able to surmount the obstacles inherent in a commercial medium like television to touch more people's imaginations with more ideas of lasting impact than any American (television?) writer of our time.”¹⁴²

883. In announcing the publication of a forthcoming book entitled *The Twilight Zone Legacy*, Chris Alexander, the editor-in-chief of FANGORIA magazine, recently explained his impetus for writing the book:

[*The Twilight Zone*] is an example of the influence of a man who in my estimation – and many others – is one of the greatest American writers, Rod Sterling. THE TWILIGHT ZONE wasn't just a three act, half hour horror program, it was concentrated poetry, soulful observations on the folly of the human condition that used the fantastic to sell that soul. It was a portal in which Sterling exploited to secretly change the face of not only genre filmmaking but in many ways, mankind. To be able to write this book is a gift and I hope I can do a small part in honoring Sterling's memory and legacy.”

884. Even Defendant LIONSGATE, which now owns and controls the Challenged Movie Title Marks, has admitted to the impressive legacy and strength of *The Twilight Zone*. In the February 2013 edition of TV GUIDE, which is owned (in part) by LIONSGATE, Sterling's *The Twilight Zone* was ranked as #4 on the TV GUIDE list of “THE 60 GREATEST DRAMAS OF ALL TIME”

885. In sharp contrast to *The Twilight Zone*'s universal recognition for the series' landmark artistry and cultural impact on the world of television and movies, Defendants' *The Twilight Saga* has struggled to find much recognition at all based on its artistic or cinematographic merits. For example, in March 2013, *The Twilight Saga: Breaking Dawn Part 2* garnered a total of seven Golden Raspberry Awards (“Razzie Awards”), the most ever awarded to one studio film, for Worst Picture, Worst Director (Bill Condon), Worst Actress (Kristen Stewart), Worst Supporting Actor (Taylor Lautner), Worst Screen Ensemble, and

¹⁴² <http://www.paleycenter.org/an-enduring-legacy/>

Worst Remake/Rip-Off or Sequel.

886. The Congressional mandate to “Promote the *useful* Arts” is clearly distinguishable from Defendants’ corporate objective to promote the *popular* arts. Of course, both *The Twilight Saga* and *The Twilight Zone* deserve their rightful place in the American marketplace of ideas. But if the purpose of U.S. Trademark law is to distinguish these brands for the benefit of consumers over the long-term, then it is reasonable for the Honorable Court to cancel Defendants’ registrations of the single word mark TWILIGHT and, consistent with the USPTO’s published rules, limit Defendants to registration of ONE Series Title / Source Identifier that Defendants have actually and consistently used in commerce - *The Twilight Saga*.

F. (LATER) REGISTRATION OF TWIHARD '325

(1) PLAINTIFF'S DOMAIN REGISTRATION ("TWIHARDER.COM")

887. On April 12, 2010, Plaintiff registered the domain name www.Twiharder.com through www.godaddy.com and launched its website shortly thereafter. [Ex. D (BTL_000206-07)].

888. Plaintiff's www.Twiharder.com website remains active as of the date of the filing of this Complaint. [Ex. F (BTL_00348-359)]

(2) PLAINTIFF'S FIRST TRADEMARK APPLICATION ("TWIHARDER")

889. On July 14, 2010, Plaintiff filed a trademark application with the USPTO principal register, Serial No. 85084979, in International Class 009 claiming to have been using the trademark TWIHARDER since April 1, 2010. [Ex. C (BTL_000069-70)]

890. As of the date that Plaintiff registered its domain name www.Twiharder.com (April 2010) and filed its trademark application for the word mark TWIHARDER with the USPTO principal register (July 2010), Defendant SUMMIT had not:

(a) applied for any trademarks or servicemarks with the USPTO bearing the word mark TWIHARD;

(b) registered any copyrights with the U.S. Copyright Office bearing the work title TWIHARD;

(c) begun selling any clothing or other merchandise bearing the word mark TWIHARD on CafePress.com.

(3) SUMMIT'S TRADEMARK APPLICATION ("TWIHARD" – CLASS 025)

891. On or about September 14, 2010, Defendants filed a trademark application with the USPTO Principal Register, Serial No. 85-976-08, in International Class 025 claiming to have been using the trademark TWIHARD in actual United States commerce since May 1, 2008 in connection with Defendants' purported sale of clothing, namely, aprons, bandanas, bibs not

of paper or plastic, dresses, hooded shirts, infantwear, jackets, jerseys, leggings, lingerie, loungewear, maternity wear, neckties, pants, ponchos, scarves, shirts, shorts, skirts, sleepwear, socks, sweaters, sweatpants, sweatshirts, tank tops, track pants, tunics, undergarments, vests, wind resistant jackets, wrap outerwear, and mittens or gloves; belts; footwear; headwear; and wrist bands made of cloth. [Ex. C (BTL_000110-12)]

892. However, in what appears on the face of the registration certificate to be a mistake of law and/or fact, Defendants filed its application for the TWIHARD trademark using Section 1(b) as its filing basis, which only applies when the Trademark applicant has not yet started actual using the trademark in commerce. [Ex. C (BTL_000111)]

(4) PLAINTIFF’S SERVICEMARK REGISTRATION (“TWIHARDER”)

893. On May 4, 2011, Plaintiff’s first application for the TWIHARDER mark under Class 009 was deemed “abandoned” by the USPTO. [Ex. C. (BTL_000070)] Plaintiff thereafter retained a trademark attorney to assist in its efforts to protect its tradename.

894. On June 27, 2011, Plaintiff filed a servicemark application with the USPTO principal register, Serial No. 85357228, in International Class 041 using the word mark (standard character) TWIHARDER and claimed first use and first use in commerce as of April 11, 2010 in connection with “Entertainment in the nature of a series of short films and feature films.” [Ex. C (BTL_00083-84)]

895. On October 13, 2011, the USPTO notified Plaintiff that its application for the TWIHARDER servicemark had been denied on several grounds, including that “the filing date of pending Application Serial No. 85128736 [SUMMIT’s TWIHARD ‘325 mark] precedes applicant’s filing date.” [Ex. C (BTL_000099)] The USPTO failed to explain to Plaintiff how a servicemark applied for by Plaintiff under Class 041 could possibly “conflict” with a trademark applied for by Defendants under Class 025.

896. On December 14, 2011, Defendants filed an application with the USPTO requesting that its application of the TWIHARD ‘325 mark be divided into two applications by:

- (a) retaining bandanas, bibs not of paper or plastic, dresses, infant wear, leggings, lingerie, maternity wear, namely, maternity sleepwear, maternity bands, maternity bras, maternity lingerie, maternity dresses, maternity pants, maternity sweaters, maternity shorts, maternity swimwear, and maternity skirts; neckties, pants, ponchos, scarves, shorts, skirts, sleepwear, socks, sweaters, sweatpants, track pants, tunics, undergarments, vests, wrap outerwear, and mittens or gloves; belts; and wrist bands made of cloth in Class 25 in the parent application; and by
- (b) making clothing, namely, aprons, hooded shirts, jackets, jerseys, loungewear, maternity wear, namely, maternity shirts; shirts, sweatshirts, tank tops; wind resistant jackets; footwear; headwear in Class 25, the subject of a new application.

897. Defendants represented that its request to divide the TWIHARD application had been filed with the USPTO “so that the child application can mature to registration as to the aforementioned goods that are currently in use in commerce.” [Ex. C (BTL_000118-19)]

898. On December 16, 2011, Defendants filed a request with the USPTO for a six-month extension of time to file the “Statement of Use” under 37 C.F.R. § 2.89 up to and including June 21, 2012. In its request, Defendants stated that “Applicant's ongoing efforts to make use of the mark in commerce on or in connection with those goods identified in the Notice of Allowance in this application has not commenced due to product research and development, market research, and promotional activities. Applicant has a continued bona fide intention to use the mark in commerce on or in connection with those goods identified in the Notice of Allowance. [Ex. C (BTL_000115-16)]

899. On March 6, 2012, the USPTO registered Defendants’ trademark TWIHARD in purported connection with Defendants’ sale of clothing, namely aprons, hooded shirts, jackets, jerseys, loungewear, maternity wear, maternity shirts, shirts, sweatshirts, tank tops, wind resistant jackets, footwear, headwear since September 22, 2008. [Ex. C (BTL_000109)].

900. Shortly thereafter, on May 25, 2012, the USPTO issued a written notice to Plaintiff advising that its applied-for servicemark for TWIHARDER, Serial No. 85357228, had been “Abandoned/Cancelled in FULL – Application Refused (05/21/2012)” on grounds that “Another company [Defendants] has filed an application to register a similar name, claiming the exclusive right to use the name.” [Ex. C (BTL_000106)]

G. GROUNDS FOR CANCELLATION (TWIHARD ‘325)

(1) “TWIHARD” IDENTIFIES FANS OF SERIES, NOT SOURCE OF SERIES

901. The purpose of U.S. trademark law is to permit consumers to identify certain products in the marketplace with the SOURCE of such products.

902. Plaintiff avers that Defendants have no business trademarking a word that is used to describe the dedicated fanbase of *The Twilight Saga* movie series.

903. “Twiards” are, by definition, NOT the source of *The Twilight Saga* series but are in fact the exact opposite; they are the loyal consumers of motion pictures produced and distributed by the source of such speech content, that being Defendants.

904. Accordingly, cancellation of TWIHARD ‘325 is appropriate because the federal registration is antithetical to the entire purpose of U.S. trademark law.

(2) CREATOR OF *THE TWILIGHT SAGA* DISCLAIMS MARK AS “AWFUL”

905. The dedicated fans and ordinary consumers of *The Twilight Saga* movie series identify Stephenie Meyer, who is the original author of the best-selling books upon which Defendants’ movie franchise is based, as the SOURCE of *The Twilight Saga*.

906. Through Defendants’ own long-standing marketing campaigns and public relations efforts, Ms. Meyer has been held out to fans of the movie franchise as the master storyteller and prodigal genius behind one of the most popular young adult novel series in

American history. As a celebrated public figure, Ms. Meyer has become to *The Twilight Saga* movie franchise what George Lucas is to *Star Wars*: the ultimate Muse.

907. David C. Friedman, the former executive vice-president and general counsel at Defendant SUMMIT before it was formally integrated with LIONSGATE, explained to SuperLawyer.com that Defendants had an obligation to align Defendants' interests with those of Ms. Meyer.

“The one issue you have, and it’s not unique to *Twilight*, is ***when you’re dealing with a book series, you have to make sure you’re on the same page as the author***,” he says. “It’s the same issue with J.K. Rowling [and the Harry Potter films]. ***We continue to have Stephenie Meyer on board. And we’ve been very fortunate.*** There haven’t been major issues. There have been little things, like scheduling conflicts [with actors.] ... [Ex. E (BTL_000282)]

908. Ms. Meyer was ranked #49 on TIME magazine’s list of the “100 Most Influential People in 2008.” Her influence, of course, was and is at its greatest with respect to the dedicated and loyal fan base for *The Twilight Saga*, who appear faithfully devoted to Ms. Meyer’s every word. These loyal fans have been ascribed the moniker (somewhat unceremoniously) as “Twihards.”

909. Stephenie Meyer, the most influential and identifiable source of *The Twilight Saga*, has publicly declared her strong disliking for the nickname used to describe her loyal fan base: ***“I don’t really like ‘Twi-Hard.’ It sounds awful.”*** [Ex. O (BTL_000774)]

910. Plaintiff avers that where the original author of the entire *The Twilight Saga* movie franchise – the actual identifiable human SOURCE of Defendants’ massive revenue streams and well-deserved leader of its consumer fanbase – publicly disclaims use of the word “Twihard,” it once again undermines the purpose of U.S. trademark law for Defendants to claim ownership over a mark in commerce that has been publically disassociated from, rather than associated with, the source of the franchise.

911. Defendants' federal registration of the mark TWIHARD '325 to sell T-shirts and clothing items to consumers that promote the very wordmark that Stephenie Meyer thinks is "awful" (synonyms: ugly, dreadful, terrible, appalling, disgusting, hideous, repulsive, atrocious, horrible, disgusting) is, at the very least, the most disingenuous trademark registration in the history of intellectual property law.

912. Accordingly, cancellation of TWIHARD '325 is appropriate because Defendants' federal registration is antithetical to the Congressional purpose for enacting the law that makes such registration even possible.

(3) ANTI-COMPETITIVE REGISTRATION

913. When viewed in the context of Defendants' rampant anti-competitive conduct in the WMPI, as set forth in Count III and other areas of this Complaint, Defendants' federal registration of the TWIHARD '325 mark represents further evidence of Defendants' willful acquisition of a monopoly power in the "Z Market."

914. Defendants' registration of the TWIHARD '325 mark has less to do with making money or promoting the mark TWIHARD for the benefit of consumers or fans and more to do with freezing out any competitors from attempting to market any product that is remotely related to the word "Twihard."

915. The chronology of events demonstrates that Plaintiff – not Defendants – was the first in time to file its TWIHARDER mark in July 2010. [Ex. C (BTL_000069-70)].

916. Defendants filed an application for the TWIHARD '325 mark in September 2010 only after Plaintiff had launched a website at www.twiharder.com in April 2010, which was streaming parodies of *The Twilight Saga* using the title *Twiharder*.

917. Defendants' intent in filing a trademark application for TWIHARD in September 2010, only after Plaintiff launched its website in April 2010 and filed its first federal application

in July 2010, was to stake a position on the Principal Register as a means to preclude USPTO registration of Plaintiff's TWIHARDER application, which is ultimately what happened.

918. Moreover, it is plausible that Defendants were being less than forthcoming with the USPTO when Defendants claimed in its September 2010 application for TWIHARD '325 that Defendants had first used the TWIHARD '325 mark in commerce (i.e., on T-shirts and other clothing) as early as May 1, 2008, which was almost SEVEN (7) full months before the first installment of *The Twilight Saga* debuted in theaters nationwide.

919. Accordingly, TWIHARD '325 should be canceled by the Honorable Court.

[NEXT PAGE]

PRAYER FOR RELIEF

WHEREFORE, Plaintiff BETWEEN THE LINES PRODUCTIONS, LLC prays for Judgment Against Defendants LIONSGATE ENTERTAINMENT CORP. and SUMMIT ENTERTAINMENT, LLC as follows:

COUNT I

DECLARATORY JUDGMENT

NON-INFRINGEMENT OF DEFENDANTS' COPYRIGHT INTERESTS PURSUANT TO THE FIRST AMENDMENT TO THE U.S. CONSTITUTION AND DEFENSE OF FAIR USE, COPYRIGHT ACT OF 1976, 17 U.S.C. §§ 101, 106-107

920. Upon good cause shown, Plaintiff seeks a declaratory judgment from the Honorable Court pursuant to 28 U.S.C. §§ 2201, 2202 and in the further interests of justice:

- (a) according Plaintiff, as the author and creator of a feature-length copyrighted motion picture entitled TWIHARDER, its full rights and privileges to exercise freedom of speech through artistic expression under the First Amendment to the U.S. Constitution (Amend. I); and
- (b) declaring TWIHARDER to be a non-infringing “Fair Use” by virtue of parody, i.e., imitative references to copyrighted elements embodied in Defendants’ pre-existing work(s), pursuant to Section 107 of the Copyright Act of 1976, 15 U.S.C. § 107.

COUNT II

VIOLATION OF DIGITAL MILLENNIUM COPYRIGHT ACT 17 U.S.C. § 512(f)

921. As a direct and/or proximate cause of Defendants’ knowingly material misrepresentations in violation of 17 U.S.C. § 512(f) of the Digital Millennium Copyright Act (DMCA), Plaintiff seeks compensatory damages for its economic injuries and loss business opportunity caused by Defendants LIONSGATE and SUMMIT, who should be held jointly and severally liable to compensate Plaintiff in an amount to be determined at trial, but no less than \$125 Million (\$125,000,000), plus costs, interest and a reasonable attorney’s fee.

COUNT III

VIOLATION OF FEDERAL ANTITRUST LAWS SHERMAN ACT, 15 U.S.C. § 2; CLAYTON ACT, 15 U.S.C. §§ 15, 26

922. As per Section 4 of the CLAYTON ACT, 15 U.S.C. § 15, Plaintiff respectfully seeks an award of treble damages from the Honorable Court against Defendants LIONSGATE and SUMMIT, to be held jointly and severally liable, in an amount to be determined at trial, but no less than \$375 million (\$375,000,000) for Defendants' unlawful offense of monopolization in violation of Section 2 of the SHERMAN ACT, 15 U.S.C. § 2.

923. As per Section 16 of the CLAYTON ACT, 15 U.S.C. § 26, Plaintiff respectfully seeks injunctive relief from the Honorable Court enjoining Defendants LIONSGATE and SUMMIT from causing further harm to the consumer marketplace by continuing to engage in predatory conduct through use of sham cease-and-desist notices and prohibited trademark/servicemark registrations, and from prospectively repeating any of the anticompetitive activities set forth in this Complaint.

924. As per Section 4 of the CLAYTON ACT, 15 U.S.C. § 15 and Section 16 of the CLAYTON ACT, 15 U.S.C. § 26, Plaintiff respectfully seeks its cost of suit, including a reasonable attorney's fee.

925. As per principles of equity and restorative justice, and to further benefit the American public interest in maintaining a wide open and robust marketplace of ideas consistent with the original intent of the Founding Fathers and Chief Architects of the Constitution of the United States, Plaintiff respectfully requests an ORDER from the Honorable Court compelling Defendant LIONSGATE and SUMMIT, jointly and severally, to disgorge a reasonable attribution of its profits derived from the gross receipts of *The Twilight Saga: Breaking Dawn Part 2* to be placed in public trust, under the supervision of the Honorable Court, to fund an expedient and legitimate effort to re-codify the common law doctrine of "Fair Use" so as to:

- (a) make the doctrine of Fair Use simple and clear for the average citizen to understand;
- (b) shift the burden to the copyright holder to affirmatively prove “*Un-Fair Use*” with respect to artistic parodies and select derivative works;
- (c) limit *ad hoc* determinations by the Government in matters of artistic and sociopolitical speech content;
- (d) foreclose enterprise monopolies from systematically depriving ordinary citizens of their First Amendment rights to freedom of expression through the useful Arts;
- (e) encourage and protect independent authorship and American innovation in the digital millennium world of consolidated global mass media.

COUNT IV

INVALIDATING PROVISIONS OF THE COPYRIGHT ACT OF 1976 AS UNCONSTITUTIONALLY OVERBROAD AND VOID FOR VAGUENESS WITH RESPECT TO FEATURE LENGTH MOTION PICTURES AND SCREENPLAYS CREATED WITH THE COMEDIC INTENT TO PARODY, MOCK, RIDICULE, SATIRIZE OR CARICATURE ANOTHER FEATURE-LENGTH MOTION PICTURE OR SERIES OF MOTION PICTURES

926. Pursuant to Rule 5.1(b) of the Federal Rules of Civil Procedure, Plaintiff shall respectfully request an ORDER from the Honorable Court under 28 U.S.C. § 2403 for certification as to questions set forth in Plaintiff’s [prospective] *Motion to Certify Questions of Constitutionality to the Attorney General*, concerning select provisions of the COPYRIGHT ACT of 1976, 17 U.S.C. §§ 101, 106, 107.

927. Plaintiff seeks a declaratory judgment from the Honorable Court pursuant to 28 U.S.C. §§ 2201, 2202 invalidating select provisions of the COPYRIGHT ACT of 1976, 17 U.S.C. §§ 101, 106, 107, as unconstitutionally overbroad and void for vagueness in contravention of the First Amendment to the U.S. Constitution with particular respect to feature-length motion pictures and literary works created with the comedic intent to parody, mock, satirize or ridicule a pre-existing feature-length dramatic motion picture (or series of motion pictures).

COUNT V

**CANCELLATION OF DEFENDANTS'
USPTO-REGISTERED TRADEMARKS & SERVICEMARKS
PURSUANT TO 15 U.S.C. §§ 1064, 1119**

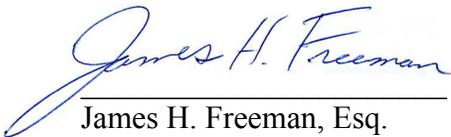
928. Upon good cause shown, Plaintiff seeks an ORDER from the Honorable Court Directing the USPTO to Cancel and Invalidate the following Trademark / Servicemark Registrations Lodged on the Principal Register, pursuant to the Court's authority under 15 U.S.C. §§ 1064, 1119 and so as to preserve the integrity of the USPTO's registration system.

- ◆ TWILIGHT '386, U.S. Reg. No. 3,884,386 [Ex. C (BTL_000123)]
- ◆ TWILIGHT '560, U.S. Reg. No. 3,756,560 [Ex. C (BTL_000143)]
- ◆ TWILIGHT '079, U.S. Reg. No. 3,817,079 [Ex. C (BTL_000125)]
- ◆ NEW MOON '792, U.S. Reg. No. 3,795,792 [Ex. C (BTL_000125)]
- ◆ NEW MOON '455, U.S. Reg. No. 4,091,455 [Ex. C (BTL_000125)]
- ◆ THE TWILIGHT SAGA '682, U.S. Reg. No. 4,012,682 [Ex. C (BTL_000126)]
- ◆ TWIHARD '325, U.S. Reg. No. 4,110,325 [Ex. C (BTL_000109)]

TRIAL BY JURY IS HEREBY DEMANDED ON COUNTS II & III

Dated: May 28, 2013
New York, New York

RESPECTFULLY SUBMITTED


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