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

Rapid Relief Team (RRT) Ltd.,

Plaintiff and Counterclaim-Defendant

v.

Cheryl Bawtinheimer,

Defendant and Counterclaim-Plaintiff

v.

Brown Rudnick LLP and Michael Graif,

Counterclaim-Defendants.

Case No. 1:26-cv-07423-GHW

SUPPLEMENTAL BRIEF IN OPPOSITION TO COUNTERCLAIM-PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

This Court asked for limited briefing on the material distinctions between Second and Ninth Circuit law as they pertain to the issues in Bawtinheimer's motion for preliminary injunction. The answer to the Court's question is straightforward: no material distinction exists that favors Bawtinheimer. On the issues that decide this motion, Second Circuit law is the same as — or less favorable to Bawtinheimer than — the Ninth Circuit law already briefed. Specifically, the governing framework for fair use is still *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, which arose from this Circuit. Further, Second Circuit law plainly forecloses Bawtinheimer's theory that copying an entire logo to criticize its owner without commenting on the logo itself is transformative. The law concerning injunctive relief in the Second Circuit similarly does not aid Bawtinheimer. The Second Circuit, like the Ninth, requires a showing of harm that is "actual and imminent" and not compensable in money, presumes nothing, and treats self-inflicted and delayed harm as fatal to the request. The Second Circuit also imposes the same heightened burden the Ninth Circuit does for a mandatory injunction, *i.e.*, the relief Bawtinheimer seeks.

The single genuine divergence Bawtinheimer identifies, *i.e.,* that in this Circuit a declaratory-judgment claim may support a preliminary injunction, changes nothing, because she still must show a likelihood of success and irreparable harm, and she can show neither.

Finally, Bawtinheimer's vexatious request that the Court should consolidate the impending November 5, 2026 hearing with a trial on the merits or enter summary judgment in her favor should be rejected. This request violates the Court's prior instructions to the parties, rests on a mischaracterization of Counterclaim-Defendants' positions, and cannot be granted on this record because to obtain such relief Bawtinheimer must first actually file a motion for summary judgment, and then Counterclaim-Defendants would need notice and opportunity to respond.

II. BACKGROUND

Plaintiff and Counterclaim-Defendant Rapid Relief Team (RRT) Ltd. ("RRT") and Counterclaim-Defendants Brown Rudnick LLP ("Brown Rudnick"), and Michael Graif ("Graif"), (collectively, "Counterclaim-Defendants") incorporate the Factual Background set forth in their Opposition, ECF No. 31, and will not repeat it extensively here in their Supplemental Opposition to Defendant and Counterclaim-Plaintiff Cheryl Bawtinheimer's ("Bawtinheimer") motion for preliminary injunction and supplemental memorandum of law (ECF No. 98, "Bawtinheimer Br.").

RRT owns the copyright in its unique cartoon bird logo known as Cookie the Kookaburra (the "Logo."). ECF No. 31 at 3. RRT uses the Logo on its equipment designed to support emergency responders and communities in need and on its standard charity assets, including its website and merchandise. *Id.* RRT owns the copyright to Cookie's image, and depictions of Cookie in different postures are registered with the U.S. Copyright Office as VA0002472486 and VA247487. *Id.*

After discovering that certain videos on two YouTube channels operated by Bawtinheimer gratuitously displayed the Logo, RRT's counsel submitted DMCA takedown requests to YouTube beginning on October 28, 2025. *Id.* The takedown requests for the five videos were narrowly tailored to the portions of each video infringing upon RRT's rights in its Logo. *Id.* RRT's counsel filed suit for copyright infringement on December 19, 2025. *Id.* at 4. RRT's counsel amended the complaint on January 30, 2026, to add infringement claims corresponding to its later takedown requests and Bawtinheimer's subsequent corresponding counternotifications. *Id.* at 5 (citing ECF No. 7). After YouTube took the videos down and put a few of them back up, RRT's counsel informed YouTube of the pending litigation and YouTube took them down again pursuant to its own policies. *Id.* at 6.

RRT has repeatedly informed Bawtinheimer, including prior to serving the complaint, that

she was free to repost her videos if she removed the infringing content. *Id.* at 7. More recently, Counterclaim-Defendants have also explained that she may blur the Logo in her videos and upload them again without changing the original hyperlink or losing the comments associated with them. *See, e.g.*, ECF No. 71 (explaining the blurring procedure). Furthermore, this case was transferred to this Court after Bawtinheimer moved to transfer rather than oppose Graif and Church's motion to dismiss for lack of personal jurisdiction. ECF No. 70.[1]

III. ARGUMENT

A. Second Circuit Fair-Use Law Forecloses Bawtinheimer's Theory; the Dispositive Rules are the Supreme Court's and Apply Identically in Both Circuits

Bawtinheimer's lead argument that the Second Circuit confronts fair use more often than the Ninth Circuit and applies "five relevant refinements" is immaterial and does not lead to a different outcome. Both circuits apply *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) and *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023). *See* Bawtinheimer Br. at 1. *Warhol* itself was a Second Circuit case, and the Supreme Court adopted this Circuit's approach to transformative use.

Factor Four: Bawtinheimer Ignores the Market Effect of Her Use of a Copyrighted Image

Bawtinheimer's central fourth-factor argument is that "a logo has no license market" and that "nobody watches a podcast about the PBCC and then gets to use the logo in its own right." Bawtinheimer Br. at 3. That framing mistakes the market for the Logo. A logo's market value is not in the "experience" of viewing it. It is in control over the association of that image with particular contexts, messages, and commercial relationships. A logo is a branding asset whose

[1] Bawtinheimer has now also filed a notice of voluntary dismissal of Church. ECF No. 102.

value depends on the owner's ability to direct where, how, and in what context it appears. RRT can license its logo for use in merchandise, co-branded events, partnerships, educational materials, or media content. Each of those uses carries a commercial value that depends on the logo appearing in a context RRT selects and controls. Bawtinheimer's videos do not "look at" the logo in the way one looks at a painting in a gallery. They display the Logo—repeatedly, prominently, and in full resolution—as the visual anchor for a sustained campaign of criticism of RRT and the PBCC. That is a use of the Logo in a context RRT has not authorized, in a manner that is in direct tension with the Logo's intended association.

Bawtinheimer's reliance on *Kelley* is equally misplaced. In *Kelley*, the copyrighted photographs appeared in a documentary as incidental fleeting use as background elements—blurry, out of focus, not the subject of the film. *Kelley v. Morning Bee, Inc.*, No. 1:21-cv-8420-GHW, 2023 WL 6276690 *9, *15 (S.D.N.Y. Sept. 26, 2023). The Court found fair use in part because the images were "***not the focus of the documentary***" and their fleeting depictions did not substitute for any market in the photographs. *Id.* (emphasis added). Here, the Logo is not fleeting, incidental, blurry, or in the background. It is displayed in full, in focus, on RRT's own promotional materials (tents, vans, food boxes, website), for 621 aggregate seconds in a single episode (ECF No. 31 at 9 & n.4), and across five separate videos. The Logo is the visual identifier of the organization being discussed; it is not a passing background detail. Reproducing it in its entirety, repeatedly, and as a central visual element of the videos is materially different from a blurry, out-of-focus photo glimpsed for a few seconds in the background of a documentary.

Bawtinheimer argues that "there is no secondary market where RRT licenses the logo to approved critics." Bawtinheimer Br. at 3. But the market for a logo is not limited to "licensing to critics." It includes any third party that wishes to use the logo in media, educational, or commercial

content. If a documentary producer, journalist, or educational organization wished to use RRT's logo in a video about the PBCC, RRT would be able to negotiate terms—context, duration, framing, and attribution. Bawtinheimer's videos already occupy that space: they are a video about the PBCC that displays RRT's logo in full, for extended periods, without license or permission. That is a direct substitute for any licensed use of the logo in a similar informational or documentary context. In a recent Second Circuit decision, *Romanova v. Amilus Inc.*, 138 F.4th 104 (2d Cir. 2025), the court found market harm from whole-image copying precisely because it "reduced the likelihood that 'others would seek and pay for a license.'" *Id.* at 120. The same logic applies here: Bawtinheimer's unlicensed, whole-Logo display substantially reduces the likelihood that a third party would seek RRT's permission to use the Logo in comparable content.

Bawtinheimer characterizes RRT's claimed harm as "harm from criticism, not piracy of a copyrighted work" (Bawtinheimer Br. at 3), and as harm to donations "by appearing in connection with GAL's continued criticism of RRT." ECF No. 31-6 at 3. But the harm to donations is not merely "reputational." It flows directly from the unauthorized use of the Logo to create a negative association with the brand. A logo's commercial value is inseparable from the public's perception of it. When the Logo is displayed for over ten minutes in a video that criticizes RRT, potential donors, partners, and licensees see the Logo in that negative context. RRT cannot control that association through any other means short of enjoining the unauthorized use of its Logo. The fact that the criticism is directed at RRT (rather than at the Logo's aesthetic design) does not eliminate the market harm: the Logo is the vehicle through which the negative association is created, and it is the Logo's unauthorized display—its reproduction in full, in focus, and in extended duration—that makes the association effective.

Bawtinheimer cites *Romanova* for the proposition that RRT's interest is "not to exploit the

value of the copyright through public dissemination, but to suppress the revelation of matters of public importance." Bawtinheimer Br. at 4 (quoting *Romanova,* 138 F.4th at 117 n.9). That mischaracterizes RRT's position. RRT does not dispute that Bawtinheimer may criticize RRT or the PBCC. RRT does not seek to enjoin speech. RRT seeks to prevent the unauthorized, unlicensed reproduction of its copyrighted Logo in a context that creates a negative commercial association. There is a critical distinction between "you cannot say bad things about us" and "you cannot use our logo, without permission, for over ten minutes in a video that attacks us but says nothing about the logo." The latter is a claim about the use of the copyrighted work, not about the content of the speech. *Romanova* addressed a different posture: a rights holder using copyright to prevent the dissemination of the underlying work's content. *Id*. at 117 n.9. Here, RRT is not preventing Bawtinheimer from discussing the PBCC. RRT is preventing Bawtinheimer from using RRT's logo as a visual prop in that discussion, without license, in a manner that usurps the market for the logo.

Factor One: Bawtinheimer's Use of Logo to Identify RRT is Not Transformative

Under *Warhol*, if an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying. *Warhol*, 598 U.S. at 532–33. Bawtinheimer concedes she used the Logo "to identify RRT" (ECF No. 31 at 24) — precisely the purpose for which RRT uses it (*id*. at 1). That shared, identifying purpose is the archetype of a ***non-transformative*** use under *Warhol*. *Warhol* answered Bawtinheimer's "criticism" theory as well: the Campbell's Soup images were fair because they targeted the copyrighted work itself, shedding light "on the work itself, not just the subject of the work." *Warhol*, 598 U.S. at 539–40. Here, by contrast, Bawtinheimer does not comment on the Logo at all; she criticizes RRT and the PBCC.

(ECF No. 31, Counterclaim Def. Br. at 23, 25). Copying "to convey a new meaning or message" is "not enough," and where the copying use closely tracks the work's ordinary use, "a particularly compelling justification is needed." *Warhol*, 598 U.S. at 547.

Second Circuit precedent confirms the point on facts materially similar to this case. In *Romanova*, the Second Circuit held that displaying an entire copyrighted image accompanied by a statement about it was neither transformative nor fair use, because transformativeness turns on whether the copying itself communicates a "message that differs from the message of the original," and "not whether the copier separately declares such a message." *Id*. at 118–19. The copy "did not communicate any criticism or commentary on the original or its author," and the first factor "decidedly favors the Plaintiff." *Id*. at 119–20. *Romanova* also confirms that *Warhol's* justification requirement is not limited to parody. *Id.* at 114–15. This forecloses Bawtinheimer's contention that labeling her videos "criticism" of RRT makes her display of the Logo transformative.

Bawtinheimer's own lead authority, *Richardson v. Townsquare Media, Inc.*, 174 F.4th 299 (2d Cir. 2026), cuts against her. There, the Second Circuit vacated a fair-use dismissal, explaining that republishing a work "without modification and with minimal integration" suggests the work retained its original purpose and character, and that "there is a difference between gesturing towards a transformative message and actually communicating that message." *Id.* at 307–08. Bawtinheimer does not modify the Logo at all; she reproduces it whole, as RRT's identifier. This is a gesture, not a communication.

Additionally, Bawtinheimer's reference to *Bouchat* again conveniently omits the context of that series of cases (or indeed even that it is the sixth installment in a series of cases). As Counterclaim-Defendants explained in the Opposition, the first *Bouchat* decision found copyright infringement of the Flying B logo by the Baltimore Ravens, who then voluntarily adopted a new

logo. *Bouchat v. Baltimore Ravens*, 737 F.3d 932, 935 (4th Cir. 2013) (explaining the case history beginning with the first infringement decision in 2001). The copyright owner filed a series of cases in which he tried to stop exceptionally insubstantial past usage of the Flying B logo in various videos and displays. In "Bouchat IV," the case relied on by Counterclaim-Defendants, the Fourth Circuit found the footage of the logo in season highlight films and in a short video shown during Ravens home games was not fair use. *Id.* at 936 (citing *Bouchat v. Baltimore Ravens Ltd. P'ship*, 619 F.3d 301 (4th Cir. 2010)). In the *Bouchat* decision cited here by Bawtinheimer, the Flying B logo was used incidentally, appearing on the Ravens' players' helmets or uniforms for fractions of a second and for the specific, historical purpose of showing past plays by the Ravens in the uniforms displaying that logo. *Id.* at 940 (describing the use as "exceptionally insubstantial" and "fleeting"). Here, the Logo is displayed for the same purpose – not a historical, or even a critical one, but merely to identify RRT – and for more than fractions of a second at a time. The *Bouchat* line of cases therefore demonstrates Counterclaim-Defendants' point: direct infringement is impermissible, and it is only attenuated, fleeting, and transformative use that is permitted.

Factors Two and Three Weigh Against Fair Use

Bawtinheimer's use of the entire logo also weighs against fair use. Bawtinheimer's criticism cases do not change the analysis. *Santos v. Kimmel*, 154 F.4th 30, 34 (2d Cir. 2025) held that transformativeness turns on "what a reasonable observer thinks, not the subjective intent of the copyright holder or that of the secondary user" which undercuts Bawtinheimer's reliance on her own description of her purpose. *Santos* found fair use only because it involved genuine commentary and no competing substitute. *Id*. at 35. Similarly, in *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471 (2d Cir. 2004) use of protected material was needed to "quote liberally" from a manual "to support their critical analyses of the seminars," not the display of an entire work to criticize

only its owner, and where the harm flowed "from the force of the criticism," not from an identical substitute. *NXIVM*, 364 F.3d at 477. Neither *Santos* nor *NXIVM* establishes that Bawtinheimer's use of the whole Logo for the same-purpose use is fair.

B. The Second Circuit's Irreparable-Harm Standard is the Same as the Ninth Circuit and Bawtinheimer Cannot Meet It

Bawtinheimer contends irreparable harm is easier to show here. The Second Circuit standard, if anything, is more demanding and matches the Ninth Circuit's post-*Winter* rule. There is no presumption; an actual showing of irreparable harm is required. In *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010), the Second Circuit held that after *eBay* and *Winter* "courts must not simply presume irreparable harm"; a copyright movant "must show that, on the facts of their case, the failure to issue an injunction would actually cause irreparable harm." *Id.* at 82. *Salinger* expressly aligned this Circuit with *Winter* — which reversed the Ninth Circuit for enjoining conduct on a mere "possibility" of harm — holding that a preliminary injunction may issue only on a "clear showing" of entitlement. *Id.* at 79. Irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction" and must "be satisfied before the other requirements for an injunction can be considered." *St. Joseph's Hosp. Health Ctr. v. Am. Anesthesiology of Syracuse, P.C.*, 131 F.4th 102, 106 (2d Cir. 2025). It requires "an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages." *St. Joseph's*, 131 F.4th at 106. "It is settled law that when an injury is compensable through money damages there is no irreparable harm." *Id*. at 108 (citation omitted).

Bawtinheimer's § 512(f) claim cannot support an injunction. The only statutory remedy under 17 U.S.C. § 512(f) is "damages, including costs and attorneys' fees." *Shaffer v. Kavarnos*, No. 23-CV-10059 (KMK), 2025 WL 2299173 (S.D.N.Y. Aug. 7, 2025); *see also* 17 U.S.C. § 512(f). Because money damages are, by definition, an adequate remedy at law, that claim cannot

support injunctive relief. *St. Joseph's*, 131 F.4th at 108. The only injunction-eligible claim is Bawtinheimer's declaratory-judgment fair-use count, which fails to establish a likelihood of success for the reasons above and, even if it could, would still fail for lack of irreparable harm.

Bawtinheimer's requested injunction also fails because her claimed harm is a consequence of her own refusal of a reasonable accommodation. In this Circuit, as in the Ninth, harm brought upon oneself does not qualify as irreparable. *Kilinc v. PMMUE Eduservices Priv. Ltd.*, No. 25 CIV. 7931 (AT) (GWG), 2026 WL 601937 (S.D.N.Y. Mar. 4, 2026). RRT repeatedly offered a concrete resolution: if Bawtinheimer edited and reposted her videos without the Logo, or merely blurring the Logo, RRT would (1) not challenge the edited videos, (2) withdraw the litigation, (3) notify YouTube that the matter was settled, and (4) not pursue costs. ECF No. 31 at 6; *see also, e.g.,* ECF No. 70. Bawtinheimer refused and declined to repost in any form. ECF No. 31 at 6, 11, 12. A movant who declines reasonable accommodation and then seeks an injunction to remedy any supposed resulting predicament cannot show irreparable harm. *Kilinc,* 2026 WL 601937, at *8.

Additionally, Bawtinheimer's reliance on *Biosafe-One, Inc. v. Hawks* for the broad proposition that a takedown of a website necessarily satisfies the irreparable harm requirement is misplaced. 524 F. Supp. 2d 452, 467 (S.D.N.Y. 2007). In *Biosafe*, the defendant accused of infringement drastically altered their website since plaintiffs filed the action and there was no longer any potentially offending material remaining on their website about which plaintiffs could complain. Bawtinheimer has not made anything close to the same showing, *i.e.*, demonstrated her copying of the Logo is fair use, and Counterclaim-Defendants have repeatedly already agreed to the videos being reposted upon removal of the infringing content.

Furthermore, Bawtinheimer's delay undercuts the urgency her motion requires. The Second Circuit treats delay as a factor that "undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." *Weight Watchers Int'l, Inc. v. Luigino's, Inc*., 423 F.3d 137, 144–45 (2d Cir. 2005). Here, Bawtinheimer waited 118 days after the first takedown before seeking relief. ECF No. 31 at 2, 14. Any subsequent delay flowed from her own request to transfer the case from the Northern District of California to this Court. Bawtinheimer Br. at 13-14.

Elrod does not convert a private takedown into First Amendment irreparable injury. Bawtinheimer relies on *Elrod v. Burns*, 427 U.S. 347 (1976), for the proposition that any loss of speech is irreparable. Bawtinheimer Br. at 11. But *Elrod* rests entirely on state action — a government employer's threatened patronage discharges — and is inapplicable to a private copyright dispute. Copyright "incorporates its own speech-protective purposes and safeguards"; so long as "Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary." *Eldred v. Ashcroft*, 537 U.S. 186, 218–19 (2003). Bawtinheimer's speech concerns are channeled through fair use, which she cannot establish, not a free-standing claim of irreparable First Amendment injury.

Additionally, Bawtinheimer argues that the DMCA strikes are something Counterclaim-Defendants' caused, as though the strikes were a manufactured instrument of censorship. Bawtinheimer Br. at 9–11. They are not. A DMCA notice that is facially valid under 17 U.S.C. § 512(c)(3) triggers a strike on the uploader's channel. That is the statutory process compromise enacted in the DMCA, and it serves as the quid pro quo that shields internet service providers like YouTube from liability for publishing content found to be infringing. The DMCA thus is a notice-and-takedown system, not an adjudication system. YouTube does not assess the merits of a

copyright claim before applying a strike. The fact that Bawtinheimer disputes the underlying infringement does not transform a facially valid notice into a "wrongful" act, any more than a civil complaint "causes" a summons. RRT sent its notices, Bawtinheimer filed counter-notifications, YouTube reinstated the videos, and RRT responded by filing this action — the exact sequence § 512(c)(3) prescribes. The strikes are the ordinary, expected, and lawful consequence of that process. They are not a product of RRT's "abuse" or "manufacture."

Bawtinheimer's more concrete fear is that a third strike will terminate her channels. Bawtinheimer Br. at 9–10. That fear is completely speculative, and it rests on a misreading of YouTube's policy. *See* Graif Decl., Ex. 1 (stating YouTube's policy of determining strikes *after* the court has reached judgment). As Bawtinheimer herself acknowledges, when a claimant initiates litigation in response to a counter-notification, "the content at issue will not be reinstated" and the strikes "may be reassessed after a court decision has been issued." (Bawtinheimer Br. at 9, quoting ECF No. 26-19 at 2). The policy does not say that YouTube will assess additional strikes on the same content while the case is pending. The strikes that currently appear on Bawtinheimer's channels — one on one channel, two on the other (ECF No. 98-2. Bawtinheimer Supp. Dec. ¶¶ 4–5 & Ex. A) — are the strikes from the original five DMCA notices. They are the subject of this litigation. It will only be after the Court resolves the fair-use question that YouTube will reassess them: if fair use is found, the strikes are removed. If infringement is found, the strikes stand. Either way, the existing strikes are frozen pending the Court's decision. YouTube does not assess a sixth, seventh, or eighth strike on the same five videos while the question of their lawfulness is *sub judice*.

The only way Bawtinheimer reaches a third strike is to hypothesize that RRT will send a new, separate DMCA notice on different content. Bawtinheimer Br. at 10–11. But RRT has not

threatened to do so, nor has it sent any further notices since the filing of the Amended Complaint. Bawtinheimer's own supplemental declaration describes "self-censorship" — a fear that "any future videos regarding RRT will be subjected to a takedown request, regardless of whether there is any good-faith basis." ECF No. 98-2, Bawtinheimer Supp. Dec. ¶¶ 6–9. Fear of a hypothetical future notice is not "actual and imminent" harm. It is the anxiety of a party who has chosen to keep her videos offline rather than simply blur the Logo during the pendency of this litigation, and then points to this supposed predicament as evidence of irreparable injury. The Second Circuit does not recognize self-anticipated, self-described, self-inflicted fear as irreparable harm.

Bawtinheimer writes that "nobody asks to tie RRT's hands" and that RRT should be "kept out of the cookie jar." Bawtinheimer Br. at 11. That is not accurate. Bawtinheimer's requested relief would do exactly that. She asks the Court to bar Counterclaim-Defendants "from sending § 512(c) requests to YouTube directed at any Bawtinheimer video in which the RRT logo appears as it appears in RRT's own published materials, in the course of commentary on RRT or the PBCC." Bawtinheimer Br. at 15. That is a blanket prohibition on RRT's ability to exercise its legal rights to protect what is indisputably its own copyrighted content. This would prevent RRT from using the DMCA process with respect to any Bawtinheimer video featuring the Logo — not just the five videos at issue, but any future video, regardless of whether the use is actually infringing. That is precisely tying RRT's hands. Bawtinheimer's characterization of RRT as the party "bound and gagged" (Bawtinheimer Br. at 11) inverts the reality: it is Bawtinheimer's proposed injunction that would bind and gag RRT from asserting its copyright in any forum short of a prior court order.

Bawtinheimer invokes *NXIVM* for the proposition that RRT is using copyright to "censor her with no due process." Bawtinheimer Br. at 11. That is false and the analogy is inapt. Bawtinheimer is not being censored, as evidenced by the hundreds of YouTube videos she posted

before and after this litigation was filed that are not the subject of this case. *See* ECF No. 31 at 3 n.3. Furthermore, in *NXIVM*, a cult used copyright in its seminar materials to prevent former members and critics from quoting the seminar content to expose the cult's practices. 364 F.3d at 477–78. The copyright was the subject of the criticism. *NXIVM*, 364 F.3d at 477 ("strong presumption that factor one favors the defendant if … defendants' use is for the purposes of 'criticism, comment'"). Here, the copyright is in RRT's logo — a short, artistic image used for identification. Bawtinheimer is not reproducing the Logo to analyze it. She is displaying it, in full, in focus, for extended durations, as the visual anchor of her criticism. The Logo is the vehicle of the criticism, not the subject of it. *NXIVM* does not stand for the proposition that a copyright holder may never assert its rights in a logo that appears in a critic's videos. It stands for the proposition that a copyright holder may not use copyright to suppress underlying content when that content is the subject of the criticism. That is not what is happening here.

C. The Second Circuit Applies the Same Heightened Mandatory-Injunction Standard, and Bawtinheimer Cannot Meet It

Bawtinheimer seeks to compel Counterclaim-Defendants to withdraw their DMCA notices and to bar future notices — relief that commands affirmative acts and so alters the status quo. That is a mandatory injunction, subject to a heightened burden in this Circuit, just as in the Ninth. A mandatory injunction "should issue only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result." *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 33 (2d Cir. 2010). The Second Circuit applies a "clear or substantial likelihood of success on the merits" standard to injunctions that alter the status quo. *Kilinc*, 2026 WL 601937 at *6.

The heightened standard applies here for the independent reason that the requested order "cannot be undone." *Tom Doherty Assocs., Inc. v. Saban Ent., Inc.*, 60 F.3d 27, 34–35 (2d Cir.

1995) (a heightened standard is warranted where "a preliminary injunction will make it difficult or impossible to render a meaningful remedy to a defendant who prevails on the merits at trial"). Once the DMCA notices are withdrawn and Bawtinheimer's videos are restored to YouTube, the relief cannot be unwound: the accumulated views, comments, and backlinks cannot be removed; the strikes on Bawtinheimer's account cannot be reinstated; and a judgment for Counterclaim-Defendants at trial would leave the videos online with all the engagement they have generated in the interim.

Bawtinheimer concedes this standard governs, invoking the "clear or substantial likelihood of success" formulation herself. She cannot satisfy it on this record. For the reasons in explained above, fair use is, at best for Bawtinheimer, genuinely disputed — which is the antithesis of the "clear" showing a mandatory injunction demands.

D. The One Genuine Circuit Difference — That a Declaratory-Judgment Claim May Support a Preliminary Injunction — Does Not Change the Result

Counterclaim-Defendants acknowledge the one point on which Second Circuit law differs from Ninth Circuit law: in this Circuit, the "serious questions" standard survived *Winter*, and the Second Circuit has concluded that the Fourth and Ninth Circuits "misread *Winter's* import" in abandoning that flexible standard. *Citigroup*, 598 F.3d at 38 n.9. A declaratory-judgment claim may therefore, in theory, support preliminary relief here.

That divergence is immaterial. A procedural avenue to the merits is not a merits victory. Even under the "serious questions" standard, the movant's "overall burden is no lighter": the balance of hardships must tip "decidedly" in the movant's favor, and "a showing of irreparable harm is fundamental to any grant of injunctive relief." *Citigroup*, 598 F.3d at 35–38. Bawtinheimer thus must still establish a likelihood of success (or serious questions with a decisive balance of

hardships) and actual, irreparable harm. She has done neither: fair use is heavily disputed (Part I), and her claimed harm is not irreparable under any construction of the facts (Part II).

The in-district cases Bawtinheimer cites, *Rag & Bone, Sound Around*, and *Excelled,* (Bawtinheimer Br. at 14) — granted relief because the movants met those substantive requirements. Bawtinheimer has not. Moreover, the same opinion on which Bawtinheimer relies for the "serious questions" standard also contains the "clear showing" required for the mandatory injunction she seeks. *Citigroup*, 598 F.3d at 33–34. The declaratory-judgment point thus opens a door that leads nowhere on this record.

E. The Court Should Reject Bawtinheimer's Vexatious Request to Consolidate the Hearing With Trial on the Merits or to Enter Summary Judgment in Her Favor

Bawtinheimer asks the Court to consolidate the preliminary-injunction hearing with a trial on the merits under Rule 65(a)(2), or to enter summary judgment in her favor under Rule 56(f)(3), on the ground that no further briefing is needed. Bawtinheimer Br. at 17–18. This request is vexatious and should be rejected. It violates the scope of the Court's supplemental-briefing order. The Court limited supplemental briefing to "the identification of Second Circuit precedent that will inform the Court's resolution" of the motion. (ECF No. 98-1.) It did not invite a motion for judgment, nor has Bawtinheimer filed any such motion. Bawtinheimer concedes her request was "unsolicited." Bawtinheimer Br. at 1. Moreover, the request has also not been the subject of any pre-motion conference or the pre-motion letter.

Entering judgment at this stage would be premature. "It is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). The purpose of a preliminary injunction "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Id*. A party "is not required to prove his case in full at a preliminary-injunction hearing." *Id*.

Consolidation under Rule 65(a)(2) requires "clear and unambiguous notice" given "either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases." *Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 101 (2d Cir. 1985). *Sua sponte* summary judgment is "firmly discouraged" and permissible "only when a court is absolutely sure that no issue of material fact exists," and only after assuring that Rule 56's notice-and-opportunity procedures "would not alter the outcome." *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 139–40 (2d Cir. 2000). Counterclaim-Defendants have not had that notice or opportunity here.

In any event, fair use remains genuinely disputed and is not amenable to summary disposition for Bawtinheimer. As Part I shows, the fair-use question is contested on every factor, and this Circuit's cases confirm that whole-work copying, reasonable necessity, and market substitution are fact-laden inquiries. *Richardson*, 174 F.4th at 309–12.

Bawtinheimer argues that because Counterclaim-Defendants agree the preliminary-injunction motion is fully briefed and do not intend to call live witnesses, the Court may proceed to judgment on the merits. ECF No. 98-1, Oct. 8 Tr. at 20:7–12, 25:11–14. That is not consent. The evidentiary needs for a decision on the merits differ from those relevant at the preliminary-injunction stage and have yet to be determined. *See Camenisch*, 451 U.S. at 395 (explaining that a party is not required to prove his case in full at a preliminary-injunction hearing). Agreeing that a preliminary-injunction application is ready for decision is not the "clear and unambiguous notice" of consolidation the law requires. *Id*. And findings made on a preliminary-injunction record "are not binding at trial on the merits." *Id*. If the Court is inclined to consider dispositive relief at this early stage of the case, Bawtinheimer would be required to file an actual motion requesting such

relief, to which Counterclaim-Defendants would be entitled to respond in full before the Court rules. *Bridgeway*, 201 F.3d at 139–40.

IV. CONCLUSION

The Court asked whether there is "any material distinction in the fair use law between the Ninth Circuit and the Second" that bears on the outcome. ECF No. 98-1. There is not. On fair use, irreparable harm, and the standard governing the mandatory injunction Bawtinheimer seeks, Second Circuit law is the same as or more demanding than the Ninth Circuit law already briefed, and it does not support her motion. The one point on which the Circuits differ — that a declaratory-judgment claim may support preliminary relief — does not relieve Bawtinheimer of the burden she cannot meet. For these reasons, and those set forth in Counterclaim-Defendants' Memorandum of Points and Authorities in Opposition to Defendant's Motion for Preliminary Injunction (ECF Nos. 31, 99), the Court should deny the motion for a preliminary injunction. The Court should also reject Bawtinheimer's unsolicited and vexatious request to consolidate the hearing with a trial on the merits or to enter summary judgment in her favor.

Dated: October 29, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of October 2026, a true and correct copy of the foregoing document was served on counsel of record via CM/ECF.

/s/ Michael R. Graif

4936-8976-9693.1

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

Rapid Relief Team (RRT) Ltd., Plaintiff and Counterclaim-Defendant v. *Cheryl Bawtinheimer,* Defendant and Counterclaim-Plaintiff v. *Brown Rudnick LLP and Michael Graif* Counterclaim-Defendants.	Case No. 1:26-cv-07423-GHW

DECLARATION OF MICHAEL R. GRAIF IN SUPPORT OF COUNTERCLAIM-DEFENDANTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO COUNTERCLAIM-PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

I, Michael R. Graif, declare as follows:

1. I am an attorney at law duly licensed to practice before the above-entitled Court, and am a Partner at the law firm of Brown Rudnick LLP, attorneys of record for Plaintiff and Counterclaim-Defendant Rapid Relief Team (RRT) Ltd. ("RRT") and Counterclaim-Defendants Brown Rudnick LLP ("Brown Rudnick") and Michael Graif (collectively, "Counterclaim-Defendants").

2. I have first-hand personal knowledge of the matters set forth herein, and if called upon as a witness, would and could competently testify thereto.

3. This declaration is submitted in support of Counterclaim-Defendants' Supplemental Brief in Opposition to Counterclaim-Plaintiff's Motion for Preliminary Injunction.

4. Attached as Exhibit 1 is a true and correct copy of a print out of YouTube's policy concerning copyright strikes as currently shown on its website.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed October 29, 2026, at New York, New York.

Michael Graif

MICHAEL R. GRAIF

EXHIBIT 1

Respond to a counter notification

When content is removed due to a copyright removal request, the uploader of that content or an authorised representative may submit a copyright counter notification. This is a legal request to reinstate content that was removed due to an alleged mistake or misidentification.

Counter notifications are forwarded to the claimant (the person who submitted the original removal request) for response if:

- All legal requirements are met
- The uploader clearly explains their right to use the content

> ⚠ Claimants have **10 US working days** to reply to the counter notification email with the required evidence of legal action. If the claimant doesn't reply within 10 days, the content at issue may be reinstated to YouTube.
>
> YouTube may re-remove content if we receive evidence of legal action after the 10 US working days or after a video has been reinstated by counter notification. In these cases, copyright strikes won't be applied while legal action is ongoing, but may be reassessed after a court decision has been issued.

Get evidence of legal action

To respond to a counter notification, claimants must include evidence that one of the following legal actions has been taken:

- An action seeking a court order against the uploader to restrain the allegedly infringing activity. This action must contain a request to enjoin the allegedly infringing conduct. It should not comprise solely a claim for damages.
- A claim against the uploader with the US Copyright Office Copyright Claims Board if the uploader is based within the United States.

Note: The claimant's action or claim should specify the uploader and content. To do so, a claimant could submit YouTube video URLs, for example.

Acceptable evidence could include a copy of one of the following:

- A lawsuit
- A court order
- A CCB claim
- Determination of infringement from the CCB

Do not submit false information. Misuse of our processes, such as submitting fraudulent documentation, may result in the termination of your account or other legal consequences.

Lawsuits should be filed in courts that have the jurisdiction to review copyright cases. For lawsuits filed in the United States, we can only accept filings in US federal courts.

While legal action is pending, the content at issue will not be reinstated to YouTube. Also, YouTube may resolve associated copyright strikes while keeping content removed from the site.

Respond via email

To respond to a counter notification:

1. **Get a copy of the evidence** of legal action as described above.
   - Links to cloud-stored files, such as Google Drive links, cannot be accepted.
2. **Go to the counter notification email** forwarded from YouTube.
   - Counter notifications are sent to the email address that was used to submit the original removal request.
3. **Reply directly to the email** with the copy of the evidence.
   - Do not send your reply as a new email to YouTube.

Recommended for you

YouTube access restrictions for users under the age of 16...

Need more help?

Try these next steps:

Post to the Help Community

Get answers from community members