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 15 KORTCHMAR

16 **UNITED STATES DISTRICT COURT**
 17 **CENTRAL DISTRICT OF CALIFORNIA**

18 DON HENLEY, MIKE CAMPBELL
 19 and DANNY KORTCHMAR,

Case No. SACV09-0481 JVS (RNBx)

20 Plaintiffs,

**PLAINTIFFS' STATEMENT OF
 UNCONTROVERTED FACTS AND
 CONCLUSIONS OF LAW IN
 SUPPORT OF MOTION FOR
 PARTIAL SUMMARY JUDGMENT**

21 v.

22 CHARLES S. DEVORE and
 23 JUSTIN HART,

Date: May 17, 2010
 Time: 1:30 P.M.
 Ctrm: Hon. James V. Selna

24 Defendants.

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1 Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56-1,
2 Plaintiffs Don Henley, Mike Campbell and Danny Kortchmar (collectively,
3 “Plaintiffs”) submit this Statement of Uncontroverted Facts and Conclusions of
4 Law in support of their Motion for Partial Summary Judgment:

5 **I. UNCONTOVERTED STATEMENT OF FACTS**

<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
6 7 8 1. Plaintiff Don Henley (“Henley”) is a 9 world-famous songwriter, recording 10 artist, and performer.	• Declaration of Don Henley in Support of Plaintiffs’ Motion for Partial Summary Judgment (“Henley Decl.”) ¶ 2
11 12 2. Henley is a founding member of the 13 Eagles, the band credited with the 14 best-selling rock album of all time in 15 the United States.	• Henley Decl. ¶ 2
16 3. In addition to his success in the 17 Eagles, Henley has enjoyed a 18 remarkable solo career, winning a 19 Grammy for his hit song “The Boys 20 of Summer” (“Boys of Summer”) in 21 1986.	• Henley Decl. ¶¶ 3-4
22 4. Plaintiff Mike Campbell 23 (“Campbell”) is also a gifted and 24 successful songwriter, recording 25 artist and producer.	• Declaration of Mike Campbell in Support of Plaintiffs’ Motion for Partial Summary Judgment (“Campbell Decl.”) ¶ 2

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
5. Campbell is a founding member of the band Tom Petty and the Heartbreakers and has worked with such notable artists as Stevie Nicks, Roy Orbison and Del Shannon, in addition to Henley.	• Campbell Decl. ¶ 2
6. Plaintiff Danny Kortchmar (“Kortchmar”) is a renowned and sought-after songwriter, recording artist and producer.	• Declaration of Danny Kortchmar in Support of Plaintiffs’ Motion for Partial Summary Judgment (“Kortchmar Decl.”) ¶ 2
7. Kortchmar has worked with Don Henley, James Taylor, Jackson Browne, Billy Joel and others.	• Kortchmar Decl. ¶ 2 • Declaration of Jacqueline Charlesworth in Support of Plaintiffs’ Motion for Partial Summary Judgment (“Charlesworth Decl.”) ¶ 15, Ex. 14 at 55 (Deposition Transcript of Danny Kortchmar, taken on January 6, 2010 (“Kortchmar Dep.”) at 55:4-16)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
8. As is common among songwriters, the Plaintiffs use fictitious business names in connection with their copyright interests.	<ul style="list-style-type: none">• Henley Decl. ¶ 6• Charlesworth Decl. ¶ 13, Ex. 12 at 36-37 (Deposition Transcript of Don Henley, taken on November 30, 2009 (“Henley Dep.”) at 143:13-144:2)• Campbell Decl. ¶ 6• Charlesworth Decl. ¶ 14, Ex. 13 at 50-51 (Deposition Transcript of Mike Campbell, taken on December 2, 2009 (“Campbell Dep.”) at 80:17-81:3)• Kortchmar Decl. ¶ 4
9. Henley uses the fictitious business names “Cass County Music” and “Woody Creek Music”; Campbell uses “Wild Gator Music”; and Kortchmar uses “Kortchmar Music.” These are not legally distinct entities, but “d/b/as” of the Plaintiffs.	<ul style="list-style-type: none">• Henley Decl. ¶ 6• Charlesworth Decl. ¶ 13, Ex. 12 at 36-37 (Henley Dep. at 143:13-144:2)• Campbell Decl. ¶ 6• Charlesworth Decl. ¶ 14, Ex. 13 at 50-51 (Campbell Dep. at 80:17-81:3)• Kortchmar Decl. ¶ 4

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
10. Henley and Campbell receive significant royalty payments for licensed sales, performances and other authorized uses of the musical composition Boys of Summer, as does Kortchmar for Dance.	<ul style="list-style-type: none">• Henley Decl. ¶ 13• Campbell Decl. ¶ 7• Kortchmar Decl. ¶ 6
11. Plaintiffs strive to make their music appealing to a large universe of fans.	<ul style="list-style-type: none">• Henley Decl. ¶ 15• Charlesworth Decl. ¶ 14, Ex. 13 at 47-48 (Campbell Dep. at 56:23-57:7)• Kortchmar Decl. ¶ 9
12. Plaintiffs are careful in licensing their copyrighted songs because they wish to protect the value of their works; in particular, they do not permit the political use of their songs because such uses could alienate fans and be harmful to future licensing and sales of their music.	<ul style="list-style-type: none">• Henley Decl. ¶ 16• Campbell Decl. ¶¶ 8-9• Kortchmar Decl. ¶¶ 9, 11• Charlesworth Decl. ¶ 13, Ex. 12 at 33-34 (Henley Dep. at 107:22-108:15)• Charlesworth Decl. ¶ 14, Ex. 13 at 49 (Campbell Dep. at 71:6-20)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
13. Plaintiffs will consider licensing their copyrighted works for uses such as television, film and promotional purposes, including humorous treatment of their songs.	<ul style="list-style-type: none">• Henley Decl. ¶¶ 17-18• Charlesworth Decl. ¶ 13, Ex. 12 at 32 (Henley Dep. at 76:7-19)• Campbell Decl. ¶ 9• Kortchmar Decl. ¶¶ 10-11
14. Campbell agreed to license a popular song that he co-authored, “Stop Draggin’ My Heart Around,” to Weird Al Yankovic, a singer known for his funny interpretations of popular songs, and Yankovic created a humorous remake of Campbell’s song, titled “Stop Draggin’ My Car Around.”	<ul style="list-style-type: none">• Campbell Decl. ¶ 11
15. In 1984, Henley released his multi-platinum solo album <i>Building the Perfect Beast</i> , which includes the two songs at issue in this case: Boys of Summer, co-written by Henley and Campbell, and “All She Wants to Do Is Dance” (“Dance”), written by Kortchmar. Both songs were top-ten hits on the Billboard charts.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 2, Ex. 1 (Boys of Summer audio)• Charlesworth Decl. ¶ 3, Ex. 2 (Dance audio)• Henley Decl. ¶ 4• Campbell Decl. ¶ 3• Kortchmar Decl. ¶¶ 5-6

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
16. Both Boys of Summer and Dance are registered with the U.S. Copyright Office.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 11, Ex. 10 at 19-20• Charlesworth Decl. ¶ 12, Ex. 11 at 21-22• Henley Decl. ¶ 5• Campbell Decl. ¶ 5• Kortchmar Decl. ¶ 5
17. Henley and Campbell jointly own the copyright to the musical composition Boys of Summer.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 11, Ex. 10 at 19-20• Henley Decl. ¶¶ 4-6• Campbell Decl. ¶¶ 2, 5-6• Charlesworth Decl. ¶ 14, Ex. 13 at 42-43 (Campbell Dep. at 6:22-7:8)
18. Kortchmar, who is entitled to collect royalties for Dance from his publisher, Warner/Chappell Music (“Warner/Chappell”), is the beneficial owner of the copyright in the musical composition Dance.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 12, Ex. 11 at 21-22• Charlesworth Decl. ¶ 22, Ex. 21 at 776-809• Kortchmar Decl. ¶¶ 4-5, 8

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
19. Henley composed the vocal melody and lyrics to the Boys of Summer while driving down the 405 freeway in Los Angeles listening to a tape of the instrumental music for the song, which had been given to him by Campbell.	<ul style="list-style-type: none">• Henley Decl. ¶ 7• Charlesworth Decl. ¶ 13, Ex. 12 at 24-26 (Henley Dep. at 19:12-21:12)• Campbell Decl. ¶ 3
20. Boys of Summer is a nostalgic love song in which the narrator reminisces about his romance with a young woman in a summer gone by, and, despite his desire not to “look back,” cannot resist recalling her image and remembering the past.	<ul style="list-style-type: none">• Henley Decl. ¶ 8• Charlesworth Decl. ¶ 13, Ex. 12 at 24-26 (Henley Dep. at 19:12-21:12)• Campbell Decl. ¶ 4• Charlesworth Decl. ¶ 14, Ex. 13 at 44-45 (Campbell Dep. at 34:7-35:8)• Charlesworth Decl. ¶ 7, Ex. 6 at 15 (Boys of Summer lyrics)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
21. The song includes a line about seeing a “Deadhead sticker on a Cadillac” because this was something Henley in fact observed as he was driving and composing the lyrics.	<ul style="list-style-type: none">• Henley Decl. ¶ 9• Charlesworth Decl. ¶ 13, Ex. 12 at 24-26 (Henley Dep. at 19:12-21:12)• Charlesworth Decl. ¶ 14, Ex. 13 at 44-45 (Campbell Dep. at 34:7-35:8)• Charlesworth Decl. ¶ 7, Ex. 6 at 15 (Boys of Summer lyrics)
22. Kortchmar wrote both the music and lyrics to Dance and presented the song to Henley to record for the <i>Building the Perfect Beast</i> album.	<ul style="list-style-type: none">• Kortchmar Decl. ¶¶ 5-6• Henley Decl. ¶ 10
23. The lyrics to Dance – an upbeat song mainly understood by audiences as being about dancing – depict a couple who travel to an unspecified foreign country where, despite expressions of violence and unrest around them, all the woman wants to do “is dance,” and “make romance.”	<ul style="list-style-type: none">• Kortchmar Decl. ¶ 7• Henley Decl. ¶ 11• Charlesworth Decl. ¶ 15, Ex. 14 at 57-61 (Kortchmar Dep. at 57:9-19, 71:16-72:20, 140:14-141:5)• Charlesworth Decl. ¶ 13, Ex. 12 at 27, 29-30 (Henley Dep. at 25:15-21, 40:6-41:6)• Charlesworth Decl. ¶ 9, Ex. 8 at 17 (Dance lyrics)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
24. Both Boys of Summer and Dance are hit songs that are instantly recognizable to a significant portion of the general public.	<ul style="list-style-type: none">• Henley Decl. ¶ 12• Charlesworth Decl. ¶ 13, Ex. 12 at 35 (Henley Dep. at 109:5-9)
25. Both Boys of Summer and Dance are closely associated in the public mind with Henley, who made them famous and continues to perform them at live shows.	<ul style="list-style-type: none">• Henley Decl. ¶ 12• Charlesworth Decl. ¶ 13, Ex. 12 at 34-35 (Henley Dep. at 108:16-109:4)• Charlesworth Decl. ¶ 14, Ex. 13 at 46 (Campbell Dep. at 47:6-10)• Charlesworth Decl. ¶ 15, Ex. 14 at 54 (Kortchmar Dep. at 49:15-21)
26. In the case of both Boys of Summer and Dance, Henley’s audiences are able to recognize the song as soon as the opening notes are played.	<ul style="list-style-type: none">• Henley Decl. ¶ 12• Charlesworth Decl. ¶ 13, Ex. 12 at 35 (Henley Dep. at 109:5-9)
27. Henley has appeared in a number of authorized music videos in which he performs various songs, including videos which feature Boys of Summer and Dance. These videos are available on YouTube and elsewhere.	<ul style="list-style-type: none">• Henley Decl. ¶ 19

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
28. Plaintiffs take action to enforce their copyrights, including by sending cease-and-desist letters and takedown notices in response to infringing uses.	<ul style="list-style-type: none">• Henley Decl. ¶ 20• Campbell Decl. ¶ 10• Kortchmar Decl. ¶ 12
29. In 2008, Henley took action against a Democratic candidate for governor of North Carolina, Richard Moore, who had used the copyrighted Eagles song, "Life in the Fast Lane," in an Internet campaign ad without permission.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 39, Ex. 38 at 839• Henley Decl. ¶ 21
30. After receiving Henley's cease and desist letter, candidate Moore voluntarily removed the ad.	<ul style="list-style-type: none">• Henley Decl. ¶ 21
31. Henley has contributed money to a number of Republican candidates, as well as Democratic candidates.	<ul style="list-style-type: none">• Henley Decl. ¶ 23• Charlesworth Decl. ¶ 13, Ex. 12 at 31 (Henley Dep. at 59:15-20)
32. Defendant Charles DeVore ("DeVore") is a California state assemblyman who is seeking the Republican nomination to run against U.S. Senator Barbara Boxer.	<ul style="list-style-type: none">• Plaintiffs' First Amended Complaint, dated September 30, 2009 ("Am. Compl.") ¶ 20• Defendants' Answer to First Amended Complaint, dated October 5, 2009 ("Answer") ¶ 20

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
33. Defendant Justin Hart (“Hart”) was hired by DeVore in late 2008 as director of Internet strategies and new media.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 46, Ex. 45 at 849-51• Am. Compl. ¶ 21• Answer ¶ 21
34. Neither DeVore nor Hart is an attorney.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 16, Ex. 15 at 98 (Deposition Transcript of Charles DeVore, taken on December 4, 2009 (“DeVore Dep.”) at 34:20-22)• Charlesworth Decl. ¶ 17, Ex. 16 at 405 (Deposition Transcript of Justin Hart, taken on January 5, 2010 (“Hart Dep.”) at 26:21-23)
35. In his capacity as director of Internet strategies and new media, Hart’s “primary goal” is to conduct online-based fundraising activities.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 17, Ex. 16 at 423 (Hart Dep. at 44:6-19)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
36. A second objective of Hart’s is to acquire “earned media” – publicity for which DeVore would otherwise have to pay – by “produc[ing] something and imply[ing] something that would catch the interest of the media and thus . . . get free, or earned media.”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 17, Ex. 16 at 440-41 (Hart Dep. at 61:7-62:22)• Charlesworth Decl. ¶ 16, Ex. 15 at 101-03 (DeVore Dep. at 37:25-39:21)
37. Defendants have placed the earned media value of the two videos at issue in this action – <i>i.e.</i> , the amount it would have cost to reach the same voters “through traditional political advertising means” – at “tens of thousands, maybe hundreds of thousands, of dollars.”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 19, Ex.18 at 759 (Defendants’ Response to Plaintiffs’ Interrogatories, No. 11)
38. Hart’s compensation is tied to the amount of funds he raises for DeVore, because he receives a percentage of the donations for which he is responsible.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 46, Ex. 45 at 850• Charlesworth Decl. ¶ 17, Ex. 16 at 433 (Hart Dep. at 54:14-25)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
39. Hart produces video ads to promote DeVore's campaign.	• Charlesworth Decl. ¶ 17, Ex. 16 at 427-28, 523, 565 (Hart Dep. at 48:15-49:17, 144:6-23, 186:13-20)
40. The videos produced by Hart are made available through chuckdevore.com (DeVore's campaign website), YouTube (which contains a link to DeVore's website), and elsewhere.	• Charlesworth Decl. ¶ 17, Ex. 16 at 427-28, 465-66, 468-69, 523, 565 (Hart Dep. at 48:15-49:17, 86:22-87:13, 89:16-90:9, 144:6-23, 186:13-20)
41. DeVore's campaign website includes a facility for making online donations.	• Charlesworth Decl. ¶ 17, Ex. 16 at 562-63 (Hart Dep. at 183:15-184:18) • Charlesworth Decl. ¶ 16, Ex. 15 at 250 (DeVore Dep. at 186:4-18)
42. As of the end of 2009, Hart had raised approximately \$340,000 in online donations for DeVore, and in 2009 was paid between \$120,000 to \$140,000 by the DeVore campaign.	• Charlesworth Decl. ¶ 17, Ex. 16 at 432, 434 (Hart Dep. at 53:24-25, 55:8-13)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
43. DeVore and Hart understand the need to obtain proper license authority for the use of copyrighted works – including music – in their campaign.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 16, Ex. 15 at 235-37, 367-68 (DeVore Dep. at 171:22-173:16, 303:5-304:20)• Charlesworth Decl. ¶ 17, Ex. 16 at 418-20, 447-49, 633-34 (Hart Dep. at 39:13-41:19, 68:5-70:15, 254:18-255:11)
44. DeVore stated that the use of music “is an endemic problem with campaigns. . . . And so, you know, I have . . . both before and after this lawsuit, said [to Hart], hey, you know, you got the rights to this, right?”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 16, Ex. 15 at 368 (DeVore Dep. at 304:6-15)
45. According to DeVore, while a “soundbite of 30 seconds or less that you might see on a news show” might be “fair use,” appropriating a song “whole cloth” in a manner that “wasn’t parody” would not.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 16, Ex. 15 at 104-05, 230:4-17, 303 (DeVore Dep. at 40:22-41:13, 230:4-17, 239:2-15)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
46. In an article he posted to an Internet site in 2008, Hart advised fellow political strategists concerning the avoidance of cease and desist letters for the online use of copyrighted images.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 47, Ex. 46 at 852• Charlesworth Decl. ¶ 17, Ex. 16 at 418-21, 633-34 (Hart Dep. at 39:13-41:19, 42:15-21, 254:18-255:20)
47. In 2009, Defendants purchased a license for approximately \$3,500 to reprint a <i>Wall Street Journal</i> article about DeVore’s use of new media, so that the article could be utilized.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 16, Ex. 15 at 235-37 (DeVore Dep. at 171:22-173:16)• Charlesworth Decl. ¶ 17, Ex. 16 at 447-49 (Hart Dep. at 68:5-70:15)
48. In March 2009, DeVore noticed an Obama bumper sticker on a Prius car at a gas station.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 16, Ex. 15 at 122-23, 125 (DeVore Dep. at 58:19-59:4, 61:16-20)
49. According to DeVore – who was familiar with Boys of Summer from listening to Henley’s music in his youth – this caused him to recall a line from Boys of Summer, which mentions a “Deadhead” bumper sticker on a Cadillac.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 16, Ex. 15 at 149-50 (DeVore Dep. at 85:7-86:8)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
50. DeVore decided to “take [Henley’s] work and to turn it for my purposes” by writing anti-Obama lyrics to Boys of Summer.	<ul style="list-style-type: none">• Charlesworth Decl. ¶16, Ex. 15 at 149 (DeVore Dep. at 85:14-18)• Charlesworth Decl. ¶ 8, Ex. 7 at 16 (Hope lyrics)
51. DeVore displayed the Boys of Summer lyrics on his computer screen, and proceeded to revise the lyrics “line by line,” resulting in a modified version of the lyrics that tracked the original song beginning, middle and end.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 16, Ex. 15 at 297-301 (DeVore Dep. at 233:16-234:8, 235:3-16, 236:23-237:23)• Charlesworth Decl. ¶ 7, Ex. 6 at 15 (Boys of Summer lyrics)• Charlesworth Decl. ¶ 8, Ex. 7 at 16 (Hope lyrics)
52. According to DeVore, “unlike the 2 Live Crew case,” he had no intent to “mock” Henley’s style.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 16, Ex. 15 at 330-31 (DeVore Dep. at 266:22-267:3)
53. DeVore copied the Henley/Campbell song “keeping the same cadence and rhyme.”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 16, Ex. 15 at 299 (DeVore Dep. at 235:3-16)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
<p>54. Some two-thirds of the lyrics from the original work remained unchanged, and the rhyme scheme and syntax were closely copied from the original.</p>	<ul style="list-style-type: none">• Declaration of Lawrence Ferrara in Support of Plaintiffs’ Motion for Partial Summary Judgment (“Ferrara Decl.”) ¶ 6(d), Ex. 1 at 7, 14-15, 19-20 (Ferrara Report)• Charlesworth Decl. ¶ 7, Ex. 6 at 15 (Boys of Summer lyrics)• Charlesworth Decl. ¶ 8, Ex. 7 at 16 (Hope lyrics)
<p>55. DeVore’s lyrics, titled “The Hope of November” (“Hope”) target President Obama, asserting that he has “broken promises,” and questioning whether he is still worthy of the support he inspired at election time.</p>	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 8, Ex. 7 at 16 (Hope lyrics)• Declaration of Mark Rose in Support of Plaintiffs’ Motion for Partial Summary Judgment (“Rose Decl.”) ¶ 6, Ex. 1 at 14-15 (Rose Report)• Charlesworth Decl. ¶ 18, Ex. 17 at 748-49 (Deposition Transcript of Martin Zeilinger, taken on March 29, 2010 (“Zeilinger Dep.”) at 130:22-131:21)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
56. At Hart’s recommendation, Defendants decided to produce a campaign video based on the Henley/Campbell song, as modified by DeVore (“Hope Video”).	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 4, Ex. 3 (Hope Video)• Charlesworth Decl. ¶ 17, Ex. 16 at 631 (Hart Dep. at 252:7-9)
57. Defendants did not seek a license to use Boys of Summer in connection with the Hope Video.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 20, Ex. 19 at 766 (Plaintiffs’ Request for Admission (“RFA”) No. 5)• Charlesworth Decl. ¶ 21, Ex. 20 at 771 (Defendants’ Response to Plaintiffs’ Request for Admission (“Defendants’ RFA Response”) No. 5)• Charlesworth Decl. ¶ 16, Ex. 15 at 310 (DeVore Dep. at 246:8-10)
58. To make the Hope Video, Hart downloaded from Apple iTunes an instrumental-only, karaoke version of Boys of Summer, entitled “Boys of Summer (Instrumental Version – Karaoke in the style of Don Henley),” which simulates the instrumentals of the original Henley track.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 17, Ex. 16 at 512-13, 573-75 (Hart Dep. at 133:10-134:14, 194:23-196:14)• Charlesworth Decl. ¶ 38, Ex. 37 at 838

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
59. Hart attempted to “emulate” Henley’s style of singing in making a recording of himself singing DeVore’s Hope lyrics to the accompaniment of the Boys of Summer karaoke track.	• Charlesworth Decl. ¶ 17, Ex. 16 at 498-99, 573-74 (Hart Dep. at 119:6-120:18, 194:17-195:7)
60. Hart searched online sources for images to illustrate DeVore’s changed lyrics.	• Charlesworth Decl. ¶ 17, Ex. 16 at 632, 675-76 (Hart Dep. at 253:7-23, 296:22-297:9)
61. The images selected by Hart for the Hope Video include images of Obama, Nancy Pelosi and others.	• Charlesworth Decl. ¶ 48, Ex. 47 at 853-78 • Charlesworth Decl. ¶ 17, Ex. 16 at 673-74 (Hart Dep. at 294:7-295:8) • Charlesworth Decl. ¶ 16, Ex. 15 at 350 (DeVore Dep. at 286:3-19) • Charlesworth Decl. ¶ 4, Ex. 3 (Hope Video)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
62. Hart did not include any images of Henley or the other Plaintiffs, or any reference to the original song, in his selection of visual content.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 17, Ex. 16 at 676 (Hart Dep. at 297:7-9)• Charlesworth Decl. ¶ 48, Ex. 47 at 853-78• Charlesworth Decl. ¶ 4, Ex. 3 (Hope Video)• Rose Decl., Ex. 1 at 24 (Rose Report)
63. Hart synchronized the visual images he found to his audio recording to produce the Hope Video.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 17, Ex. 16 at 631-32 (Hart Dep. at 253:9-17)
64. The iTunes contractual terms, to which Hart had agreed, limited his use of the Boys of Summer karaoke track to “personal” uses, and excluded “promotional use rights.”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 52, Ex. 51 at 955-56• Charlesworth Decl. ¶ 17, Ex. 16 at 645-47 (Hart Dep. at 266:15-268:6)
65. Except for shortening some instrumental-only segments, the Hope Video incorporates all of the music from Boys of Summer.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 4, Ex. 3 (Hope Video)• Ferrara Decl. ¶¶ 6, 7, Ex. 1 at 10-11 (Ferrara Report)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
<p>66. Hart included the following introduction over the instrumental opening of the song in the Hope Video: "Hi, this is Justin Hart. I'm Director of Internet Strategies and New Media for the Chuck DeVore campaign. And we want to thank you, the thousands of supporters of Chuck DeVore, in his bid for the U.S. Senate. And to show you our appreciation, Chuck has prepared a very serious exposition on the financial crisis and political realities of our day under President Barack Obama."</p>	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 17, Ex. 16 at 671-72 (Hart Dep. at 292:22-293:17)• Charlesworth Decl. ¶ 4, Ex. 3 (Hope Video)
<p>67. Hart superimposed text with the Hope lyrics throughout the Hope Video.</p>	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 4, Ex. 3 (Hope Video)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
68. At the conclusion of the Hope Video, with the karaoke track still playing, the following statement is included: “This was not what any of us bargained for is it? Time for real change in Washington. Time for Chuck DeVore. Paid for by DeVore for California.”	• Charlesworth Decl. ¶ 4, Ex. 3 (Hope Video)
69. Defendants included the closing statement as “a summary of the campaign message” because of federal concerning campaign ads.	• Charlesworth Decl. ¶ 16, Ex. 15 at 350-51 (DeVore Dep. at 286:20-287:22) • Charlesworth Decl. ¶ 17, Ex. 16 at 689 (Hart Dep. at 310:5-20)
70. Defendants posted the Hope Video to YouTube and other online sites.	• Charlesworth Decl. ¶ 17, Ex. 16 at 465-66 (Hart Dep. at 86:22-87:13)
71. DeVore chose Boys of Summer as the “vehicle” for his Obama critique.	• Charlesworth Decl. ¶ 44, Ex. 43 at 847 • Charlesworth Decl. ¶ 16, Ex. 15 at 189-90 (DeVore Dep. at 125:23-126:22) • Charlesworth Decl. ¶ 17, Ex. 16 at 499 (Hart Dep. at 120:19-23)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
72. Hart believes that “different songs” could have been used to present the views in the Hope Video.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 17, Ex. 16 at 711-12 (Hart Dep. at 332:18-333:7)
73. Use of a popular song allowed DeVore “to reach people in three minutes who would never read a position paper or a news release or listen to a 30 minute speech on the topic.”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 34, Ex. 33 at 833• Charlesworth Decl. ¶ 16, Ex. 15 at 246-47 (DeVore Dep. at 182:7-20, 183:15-18)
74. On April 1, 2009, DeVore included a link to the Hope Video in an article he contributed to the entertainment-related website “Big Hollywood.” DeVore described the Hope lyrics in the Big Hollywood article as his “Obama parody lyrics set to Don Henley’s ‘Boys of Summer.’”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 23, Ex. 22 at 810• Charlesworth Decl. ¶ 16, Ex. 15 at 251-52 (DeVore Dep. at 187:18-188:13)
75. DeVore stated that he posted the Hope lyrics “with apologies to Don Henley” because he was “taking [Henley’s] work and . . . using it for something else.”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 16, Ex. 15 at 254-55 (DeVore Dep. at 190:23-191:4)• Charlesworth Decl. ¶ 23, Ex. 22 at 810

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
76. DeVore's article also announced a contest, in which others were encouraged to make and submit "professional" versions of the Hope Video, with a winner to be selected by the campaign.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 23, Ex. 22 at 810
77. Upon becoming aware of the Defendants' use of his song, Boys of Summer, Henley directed that a DMCA takedown notice be sent by legal counsel to YouTube on April 3, 2009.	<ul style="list-style-type: none">• Henley Decl. ¶ 24• Charlesworth Decl. ¶ 54, Ex. 53 at 995-999
78. YouTube complied with the notice by removing the Hope Video from its service.	<ul style="list-style-type: none">• Am. Compl. ¶ 38• Answer ¶ 38
79. At the time it was removed, the Hope Video had been viewed over 800 times in the United States and other countries.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 49, Ex. 48 at 879• Charlesworth Decl. ¶ 50, Ex. 49 at 882• Charlesworth Decl. ¶ 17, Ex. 16 at 551-52, 558-60 (Hart Dep. at 172:24-173:14, 179:20-181:8)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
80. Henley had to serve an additional DMCA notice to have the Hope Video removed from an additional site where it was posted by the DeVore campaign.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 40, Ex. 39 at 840-41• Henley Decl. ¶ 25
81. During the period the Hope Video was available online, the DeVore campaign received online donations.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 51, Ex. 50 at 926• Charlesworth Decl. ¶ 17, Ex. 16 at 561-62, 185:4-11 (Hart Dep. at 182:9-183:23, 185:4-11)
82. Upon receiving an email notification from YouTube that the Hope Video had been removed at the request of Henley, DeVore “high-fiv[ed]” his communications director, Josh Treviño. DeVore believed that they “had struck a vein of gold in the campaign.”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 16, Ex. 15 at 162-64 (DeVore Dep. at 98:17-99:5, 100:5-11)
83. According to Hart, upon learning of the takedown notice, “we laughed and we said that was exactly the effect that we were hoping to parody here. This is great.”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 17, Ex. 16 at 484 (Hart Dep. at 105:13-23)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
84. As a result of Defendants' receiving the takedown notice, DeVore felt "we were given a lemon; let's try to make some lemonade" by "try[ing] to make Henley the issue."	• Charlesworth Decl. ¶ 16, Ex. 15 at 101-02 (DeVore Dep. at 37:6-38:17)
85. DeVore believed that "turning lemons into lemonade" meant gaining "national recognition" for his campaign.	• Charlesworth Decl. ¶ 16, Ex. 15 at 217-18 (DeVore Dep. at 153:24-154:4)
86. DeVore believed that his campaign would gain "earned media opportunities" because it was Henley who had directed the issuance of the takedown notice, as opposed to some "faceless international corporation."	• Charlesworth Decl. ¶ 16, Ex. 15 at 162-64 (DeVore Dep. at 98:17-100:2)
87. According to DeVore, if the Henley matter "became a national story," then the money "might have come rolling in," but it did not become a national story.	• Charlesworth Decl. ¶ 25, Ex. 24 at 816 • Charlesworth Decl. ¶ 16, Ex. 15 at 209-11, 214-15 (DeVore Dep. at 145:18-147:21, 150:22-151:12)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
88. After receiving the takedown notice, DeVore told his staff to “man the ramparts” and “[p]repare the press releases!”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 29, Ex. 28 at 825• Charlesworth Decl. ¶ 16, Ex. 15 at 101 (DeVore Dep. at 37:3-20)
89. In moving ahead with his plan, DeVore was aware not only of the Supreme Court’s <i>Campbell v. Acuff-Rose</i> decision, but also the Ninth Circuit’s subsequent determination in <i>Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.</i> , that copying Dr. Seuss’s work to comment on the O.J. Simpson trial was not parody.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 16, Ex. 15 at 108-11, 114-16 (DeVore Dep. at 44:23-45:13, 46:2-4, 47:5-9, 50:6-51:7, 52:16-24)

<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
<p>90. Hart reported to DeVore that he had had dinner with an attorney friend and that the friend had indicated they could proceed with the counternotification. However, Hart's attorney friend was an in-house tax advisor, not a copyright lawyer. He had not seen the video at the time of the dinner with Hart, consulted no legal authority, and offered no opinion on fair use.</p>	<ul style="list-style-type: none"> • Charlesworth Decl. ¶ 17, Ex. 16 at 489-92, 730-36 (Hart Dep. at 110:6-23, 111:9-14, 112:19-113:14, 351:11-357:25) • Charlesworth Decl. ¶ 16, Ex. 15 at 157-58 (DeVore Dep. at 93:23-94:19) • Charlesworth Decl. ¶ 31, Ex. 30 at 828
<p>91. Hart's attorney friend told Hart that it would be a "good" idea for Hart to hire an attorney.</p>	<ul style="list-style-type: none"> • Charlesworth Decl. ¶ 17, Ex. 16 at 735-36 (Hart Dep. at 356:2-357:14)
<p>92. DeVore was aware that by submitting the counternotification to YouTube under the DMCA, Henley would need to file a lawsuit in order to prevent the Hope Video from being reposted.</p>	<ul style="list-style-type: none"> • Charlesworth Decl. ¶ 16, Ex. 15 at 95-96 (DeVore Dep. at 31:10-32:14)
<p>93. DeVore emailed his staff, "[i]f Henley gets a legal injunction to restrain us, then better."</p>	<ul style="list-style-type: none"> • Charlesworth Decl. ¶ 31, Ex. 30 at 828 • Charlesworth Decl. ¶ 16, Ex. 15 at 164 (DeVore Dep. at 100:15-24)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
94. In DeVore’s view, this would “raise[] the stakes. It makes more attention on [sic] what would otherwise be a fairly anonymous legal action. And campaigns thrive on attention.”	• Charlesworth Decl. ¶ 16, Ex. 15 at 164-65 (DeVore Dep. at 100:25-101:5)
95. DeVore “made the calculation . . . that perhaps the earned media value [of the lawsuit] would outweigh the time and effort and diversion and campaign resources in fighting the fight.”	• Charlesworth Decl. ¶ 16, Ex. 15 at 218 (DeVore Dep. at 154:5-154:14)
96. DeVore drafted the April 7, 2009 counternotification to YouTube himself, and understood he was submitting it as a sworn statement under penalty of perjury, as required by the DMCA.	• Charlesworth Decl. ¶ 44, Ex. 43 at 847 • Charlesworth Decl. ¶ 16, Ex. 15 at 189-91 (DeVore Dep. at 125:24-127:8)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
97. DeVore included the following characterization of the Hope Video as the basis of his counternotification: “‘After the Hope of November is Gone’ is an allowable music video parody of Barack Obama using Don Henley’s ‘The Boys of Summer’ as a vehicle.”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 44, Ex. 43 at 847• Charlesworth Decl. ¶ 16, Ex. 15 at 190 (DeVore Dep. at 126:18-22)
98. On April 7, 2009, DeVore posted an article on Big Hollywood, titled “Don Henley Strikes Back.” In the April 7, 2009 article, DeVore took issue with YouTube’s takedown of his “parody using ‘The Boys of Summer’ to lampoon President Obama,” vowing to “look[] for every opportunity to turn any Don Henley work I can into a parody of any left tilting politician who deserves it (I keep thinking ‘All She Wants To Do Is Dance’ would make a great transition into a Barbara Boxer parody).”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 24, Ex. 23 at 812• Charlesworth Decl. ¶ 16, Ex. 15 at 174-76 (DeVore Dep. at 110:24-112:6)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
99. In the same April 7, 2009 “Big Hollywood” article, DeVore indicated he would arrange to have the Hope Video posted on another website, popmodal.com, and noted that the video was still available on one of his own websites, chuck76.com.	• Charlesworth Decl. ¶ 24, Ex. 23 at 812
100. In an email to his staff, dated April 7, 2009, DeVore wrote, “Let’s rumble. I say we rifle through all of Mr. Henley’s cateloge [sic] for material.”	• Charlesworth Decl. ¶ 30, Ex. 29 at 826 • Charlesworth Decl. ¶ 16, Ex. 15 at 172-73 (DeVore Dep. at 108:6-109:5)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
101. DeVore modified the lyrics to Dance to criticize Senator Barbara Boxer.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 26, Ex. 25 at 820• Charlesworth Decl. ¶ 16, Ex. 15 at 276-77 (DeVore Dep. at 212:22-213:3)• Charlesworth Decl. ¶ 10, Ex. 9 at 18 (Tax lyrics)• Rose Decl. ¶ 7, Ex. 1 at 9, 21, 23-24 (Rose Report)• Charlesworth Decl. ¶ 18, Ex. 17 at 750-51 (Zeilinger Dep. at 136:10-137:10)
102. As he did with Boys of Summer and Hope, DeVore fashioned a verse and chorus to correspond with each original verse and chorus in Dance to produce “All She Wants to Do Is Tax” (“Tax”).	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 16, Ex. 15 at 301-02, 318 (DeVore Dep. at 237:24-238:10, 254:8-22)• Charlesworth Decl. ¶ 9, Ex. 8 at 17 (Dance lyrics)• Charlesworth Decl. ¶ 10, Ex. 9 at 18 (Tax lyrics)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
103. Three-quarters of the original lyrics in Dance were copied into the Tax lyrics.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 9, Ex. 8 at 17 (Dance lyrics)• Charlesworth Decl. ¶ 10, Ex. 9 at 18 (Tax lyrics)• Ferrara Decl. ¶¶ 6(d), 7, Ex. 1 at 7, 15, 19-20 (Ferrara Report)
104. The original rhyme scheme and syntax in Dance was copied in Tax.	<ul style="list-style-type: none">• Ferrara Decl. ¶ 6(d), Ex. 1 at 7, 15 (Ferrara Report)
105. According to DeVore, the Tax lyrics target Boxer’s “penchant for raising taxes.”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 35, Ex. 34 at 835• Charlesworth Decl. ¶ 16, Ex. 15 at 363-64 (DeVore Dep. at 299:1-300:1)
106. The Tax lyrics reference various policy concerns tied to DeVore’s anti-taxation campaign platform, such as cap-and-trade legislation, the carbon trading “scam,” and global warming.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 10, Ex. 9 at 18 (Tax lyrics)• Charlesworth Decl. ¶ 26, Ex. 25 at 820• Charlesworth Decl. ¶ 16, Ex. 15 at 278-79 (DeVore Dep. at 214:4-215:4)
107. Hart believes that Defendants could have used another song to provide the message in Tax.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 17, Ex. 16 at 711 (Hart Dep. at 332:4-15)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
108. Hart assembled a new video incorporating the Kortchmar song with DeVore's modified lyrics ("Tax Video").	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 17, Ex. 16 at 663-64, 681-83, 689-90 (Hart Dep. at 284:5-285:8, 302:18-304:12, 310:5-20, 311:10-14)• Charlesworth Decl. ¶ 5, Ex. 4 (Tax Video)
109. No lawyer had confirmed the validity of Defendants' claim of fair use before they posted the Tax Video on the Internet.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 16, Ex. 15 at 157-58, 353 (DeVore Dep. at 93:19-94:19, 289:19-22)• Charlesworth Decl. ¶ 17, Ex. 16 at 520, 730, 733-39 (Hart Dep. at 141:9-17, 351:11-24, 354:4-18, 355:3-360:14)
110. Defendants did not seek permission from the copyright owner of Dance to use the song in the Tax Video.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 16, Ex. 15 at 310 (DeVore Dep. at 246:8-14)• Charlesworth Decl. ¶ 20, Ex. 19 at 766 (RFA No. 6)• Charlesworth Decl. ¶ 20, Ex. 20 at 771 (Defendants' RFA Response No. 6)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
111. Using an iTunes karaoke track simulating the instrumentals of the original Henley version of Dance, Hart recorded the Tax lyrics in a professional recording studio.	• Charlesworth Decl. ¶ 17, Ex. 16 at 513, 574-75, 663-34, 695 (Hart Dep. at 134:6-16, 195:8-196:14, 284:5-285:8, 316:20-23)
112. Hart used the entire karaoke track of Dance except for some instrumental-only segments that he shortened.	• Ferrara Decl. ¶ 6(a), Ex. 1 at 12-13 (Ferrara Report)
113. Hart re-recorded the audio for the Hope video while working in the professional studio on the Tax Video.	• Charlesworth Decl. ¶ 17, Ex. 16 at 665-66 (Hart Dep. at 286:17-287:25)
114. Hart located online images to illustrate and “complement” DeVore’s Tax lyrics.	• Charlesworth Decl. ¶ 17, Ex. 16 at 681-83 (Hart Dep. at 302:18-304:12)
115. Hart licensed stock video footage for the Tax Video from an online source for a fee.	• Charlesworth Decl. ¶ 17, Ex. 16 at 681-83, 690 (Hart Dep. at 302:18-304:12, 311:10-14)
116. The images Hart selected for the Tax Video include photos of Barbara Boxer, Al Gore and the Disney character Scrooge McDuck.	• Charlesworth Decl. ¶ 5, Ex. 4 (Tax Video) • Charlesworth Decl. ¶ 16, Ex. 15 at 350 (DeVore Dep. at 286:3-12)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
117. Hart did not choose any image of Henley or the other Plaintiffs to include in the Tax Video, or any image referencing the original song.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 5, Ex. 4 (Tax Video)• Charlesworth Decl. ¶ 17, Ex. 16 at 682 (Hart Dep. at 303:13-15)• Rose Decl., Ex. 1 at 24 (Rose Report)
118. At the end of the Tax Video, Hart added the written statement: “Visit chuckdevore.com. Paid for by DeVore for California.”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 17, Ex. 16 at 689 (Hart Dep. at 310:5-20)• Charlesworth Decl. ¶ 5, Ex. 4 (Tax Video)
119. Hart posted what he described as the “All She Wants to Do is Tax Music video parody of Barbara Boxer” on YouTube and other sites.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 55, Ex. 54 at 1000• Charlesworth Decl. ¶ 17, Ex. 16 at 466 (Hart Dep. at 87:4-13)
120. On April 14, 2009, Hart sent an email to a list of approximately 40 “eLeaders” associated with the DeVore campaign with a link to the new Tax Video.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 28, Ex. 27 at 824• Charlesworth Decl. ¶ 17, Ex. 16 at 531-32 (Hart Dep. at 152:3-153:6)
121. DeVore’s “eLeaders” are persons who had signed up to help DeVore with fundraising and other activities.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 17, Ex. 16 at 531-32 (Hart Dep. at 152:18-153:4)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
122. DeVore’s April 14, 2009 email requested the “eLeaders” to “view our new viral video satire on Barbara Boxer.”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 28, Ex. 27 at 824
123. On April 14, 2009, Hart distributed an electronic newsletter to the campaign’s entire email list that included a snapshot image of the Tax Video and a link to the YouTube posting.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 32, Ex. 31 at 829• Charlesworth Decl. ¶ 17, Ex. 16 at 493-94 (Hart Dep. at 114:8-115:25)• Charlesworth Decl. ¶ 16, Ex. 15 at 248-49 (DeVore Dep. at 184:8-185:23)
124. Hart’s April 14, 2009 email contained a link to chuckdevore.com, as well as a link to DeVore’s donation page: “Help beat Boxer – Contribute to Chuck’s campaign.”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 32, Ex. 31 at 829• Charlesworth Decl. ¶ 17, Ex. 16 at 495-96 (Hart Dep. at 116:16-117:2)• Charlesworth Decl. ¶ 16, Ex. 15 at 249-50 (DeVore Dep. at 185:24-186:20)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
125. The Tax Video had “viral” qualities, meaning that it proceeded to spread rapidly through the Internet.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 16, Ex. 15 at 242-43 (DeVore Dep. at 178:9-179:3)• Charlesworth Decl. ¶ 17, Ex. 16 at 539-40 (Hart Dep. at 160:6-161:6)
126. The Tax Video was embedded by third parties, such as Fox News, on their own websites.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 16, Ex. 15 at 365 (DeVore Dep. at 301:5-22)• Charlesworth Decl. ¶ 36, Ex. 35 at 836• Charlesworth Decl. ¶ 17, Ex. 16 at 533-34 (Hart Dep. at 154:7-155:3)• Charlesworth Decl. ¶ 33, Ex. 32 at 832
127. The Tax Video achieved the YouTube status of third rising News & Politics video in the world in less than twenty-four hours.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 35, Ex. 34 at 835• Charlesworth Decl. ¶ 16, Ex. 15 at 362-64 (DeVore Dep. at 298:21-300:25)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
128. On April 15, 2009, DeVore sent an email to press contacts noting that the video was the third rising “News & Political” video on YouTube, and explaining: “Based on rocker Don Henley’s ‘All She Wants to do is Dance,’ ‘All She Wants to do is Tax,’ takes on Sen. Boxer’s penchant for raising taxes.”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 35, Ex. 34 at 835• Charlesworth Decl. ¶ 16, Ex. 15 at 363-64 (DeVore Dep. at 299:10-300:25)
129. On April 16, 2009, Warner/Chappell, Kortchmar’s music publisher, sent a DMCA notice to YouTube requesting removal of the Tax Video.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 41, Ex. 40 at 842-43• Kortchmar Decl. ¶¶ 8, 14
130. YouTube complied with Warner/Chappell’s notice by removing the Tax Video from its service.	<ul style="list-style-type: none">• Am. Compl. ¶ 50• Answer ¶ 50

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
131. At the time it was taken down, the Tax Video had exceeded 20,000 views in the United States and abroad.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 49, Ex. 48 at 879• Charlesworth Decl. ¶ 50, Ex. 49 at 883-87• Charlesworth Decl. ¶ 17, Ex. 16 at 540, 550-553, 558-60 (Hart Dep. at 161:7-18, 171:13-174:17, 179:20-181:8)
132. The DeVore campaign received online donations throughout the period that the Tax Video was available.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 51, Ex. 50 at 926• Charlesworth Decl. ¶ 17, Ex. 16 at 561-62, 564 (Hart Dep. at 182:9-183:23, 185:4-11)
133. On April 17, 2009, Plaintiffs Henley and Campbell filed the instant action, asserting claims for copyright infringement based on Defendants' unlawful use of Boys of Summer in the Hope Video.	<ul style="list-style-type: none">• Plaintiffs' Original Complaint, dated April 17, 2009 ("Compl.") ¶¶ 43-67• Am. Compl. ¶¶ 61-85

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
134. In the Complaint, Henley asserted claims for false endorsement under the Lanham Act based on the likelihood that viewers of the Hope and Tax Videos who recognized his music would assume he endorsed or approved of DeVore or his campaign.	<ul style="list-style-type: none">• Compl. ¶¶ 68-76• Am. Compl. ¶¶ 111-19
135. After the filing of the Complaint, Defendants considered whether to “ratchet up the heat by posting [one of their videos] in numerous places” or “take it to the next level” by “do[ing] another PARODY of a Henley song (this time of Henley himself).”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 37, Ex. 36 at 837• Charlesworth Decl. ¶ 17, Ex. 16 at 611-14 (Hart Dep. at 232:6-235:19)
136. After they were served with the Complaint in this action, DeVore and Hart retained an attorney in connection with Plaintiffs’ infringement claims.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 16, Ex. 15 at 198 (DeVore Dep. at 134:7-24)• Charlesworth Decl. ¶ 17, Ex. 16 at 616 (Hart Dep. at 237:6-16)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
137. On July 17, 2009, DeVore submitted a counternotification to YouTube with respect to the Tax Video, under penalty of perjury.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 45, Ex. 44 at 848• Charlesworth Decl. ¶ 16, Ex. 15 at 193-94 (DeVore Dep. at 129:6-130:2)
138. In the counternotification, DeVore stated that his “parody lyrics are critical of the cap-and-trade bill being considered in the U.S. Senate at this time, as well as my opponent in the U.S. Senate race, Sen. Barbara Boxer. As a result, the lyrics I wrote are substantially different than ‘All She Wants to Do is Dance,’ a song that was critical of U.S. foreign policy in the 1980s.”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 45, Ex. 44 at 848• Charlesworth Decl. ¶ 16, Ex. 15 at 193-94 (DeVore Dep. at 129:6-130:2)
139. After DeVore sent his counternotification, the Tax Video was restored by YouTube.	<ul style="list-style-type: none">• Am. Compl. ¶ 53• Answer ¶ 53

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
140. The version of the Tax Video restored by YouTube included a written disclaimer, added by DeVore, stating that “Don Henley did not approve this message. Don Henley not only didn’t approve this message, he doesn’t approve of Chuck DeVore or any of Chuck DeVore’s message. The feeling is mutual.”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 6, Ex. 5 (Tax Video with disclaimer)• Charlesworth Decl. ¶ 16, Ex. 15 at 352-53 (DeVore Dep. at 288:12-289:1)
141. According to DeVore, the disclaimer was added to the reposted version of Tax to make it clear that the video “was not approved by Mr. Henley.”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 16, Ex. 15 at 352-53 (DeVore Dep. at 288:12-289:1)
142. On September 30, 2009, Plaintiffs filed their First Amended Complaint, which added Kortchmar as a third Plaintiff, and additional claims of copyright infringement with respect to Dance.	<ul style="list-style-type: none">• Am. Compl. ¶¶ 86-110

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
143. In conjunction with the filing of Kortchmar’s infringement claim, a new DMCA notice was submitted to YouTube with respect to the Tax Video.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 42, Ex. 41 at 844-45• Kortchmar Decl. ¶ 16
144. YouTube complied with the new DMCA notice by removing the Tax Video.	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 43, Ex. 42 at 846• Kortchmar Decl. ¶ 16
145. Shortly before the filing of this motion, DeVore posted an article to the “Big Hollywood” website stating: “Had I known a year ago where we would be today would I have still written the parodies and drawn Henley’s lawsuit? Absolutely.”	<ul style="list-style-type: none">• Charlesworth Decl. ¶ 27, Ex. 26 at 822-23
146. The Hope Video targets and criticizes Barack Obama.	<ul style="list-style-type: none">• Rose Decl. ¶ 6, Ex. 1 at 8, 14-16, 18-19, 25 (Rose Report)• Charlesworth Decl. ¶ 18, Ex. 17 at 748-49 (Zeilinger Dep. at 130:22-131:21)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
147. The Tax Video targets and criticizes Barbara Boxer and her tax policies.	<ul style="list-style-type: none">• Rose Decl. ¶ 7, Ex. 1 at 9, 21, 23-25 (Rose Report)• Charlesworth Decl. ¶ 18, Ex. 17 at 750-51 (Zeilinger Dep. at 136:5-137:10)
148. Neither video mentions Henley or the other Plaintiffs or contains an image of Henley or the other Plaintiffs.	<ul style="list-style-type: none">• Rose Decl. ¶ 9, Ex. 1 at 24 (Rose Report)• Charlesworth Decl. ¶ 4, Ex. 3 (Hope Video)• Charlesworth Decl. ¶ 5, Ex. 4 (Tax Video)
149. The instrumental music and melodies in the Hope and Tax Videos are slavishly copied and virtually identical to the corresponding music and melodies in the original compositions.	<ul style="list-style-type: none">• Ferrara Decl. ¶¶ 6(a), 6(b), 7, Ex. 1 at 6, 13-15, 19-20 (Ferrara Report)
150. Defendants took far more musical expression than was necessary to evoke the originals.	<ul style="list-style-type: none">• Ferrara Decl. ¶¶ 6(b), 7, Ex. 1 at 6, 13-15, 19-20 (Ferrara Report)

<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
<p>151. The music in Defendants’ videos does not build upon, or add new or independent expression to, the music in the originals.</p>	<ul style="list-style-type: none"> • Ferrara Decl. ¶¶ 6(e), 9, Ex. at 6-7, 13, 14, 19-20 (Ferrara Report)
<p>152. Some two-thirds of the lyrics in Hope (65%) and three-quarters of the lyrics in Tax (74.7%) are simply copied from the original compositions, and, in addition, the lyrics of Hope and Tax both closely copy the rhyme and syntax of the originals.</p>	<ul style="list-style-type: none"> • Ferrara Decl. ¶¶ 6(d), 7, Ex. at 7, 14-15, 20 (Ferrara Report)
<p>153. Defendants’ use of Plaintiffs’ songs not only assured a larger audience for Defendants’ campaign ads, but also increased the likelihood that an audience would listen and be receptive to DeVore’s messages.</p>	<ul style="list-style-type: none"> • Declaration of Jon Albert in Support of Plaintiffs’ Motion for Partial Summary Judgment (“Albert Decl.”) ¶ 7, Ex. 1 at 9 (Albert Report)
<p>154. Defendants’ use of Plaintiffs’ songs in the Hope and Tax Videos was a promotional, commercial use by advertising industry standards.</p>	<ul style="list-style-type: none"> • Albert Decl. ¶ 7, Ex. 1 at 9 (Albert Report)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
155. Advertisers avoid songs that are already associated with particular products or causes, or that have political or controversial associations.	• Albert Decl. ¶ 9, Ex. at 12 (Albert Report)
156. Defendants' uses, if not halted, would be harmful to the market for Plaintiffs' songs, because they politicize the songs and could alienate fans.	• Albert Decl. ¶¶ 8-12, Ex. 1 at 12 (Albert Report)
157. Defendants' conduct is harmful both with respect to the market for secondary, or derivative, uses of the songs by potential licensees and advertisers, and with respect to the market for the original sound recordings.	• Albert Decl. ¶¶ 10-12, Ex. 1 at 12 (Albert Report)
158. If permitted to continue, Defendants' uses would limit potential endorsement opportunities for Henley.	• Albert Decl. ¶ 13, Ex. 1 at 12 (Albert Report)

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<u>Uncontroverted Fact</u>	<u>Supporting Evidence</u>
159. The minimum license fee a licensee would expect to pay for the short-term, Internet-only promotional use of Boys of Summer, such as Defendants' use in the Hope Video, would be \$500,000.	• Albert Decl. ¶¶ 15-16, Ex. 1 at 10-11 (Albert Report)
160. The minimum a licensee would expect to pay for the short-term Internet-only promotional use of Dance, such as Defendants' use in the Tax Video, would be \$200,000.	• Albert Decl. ¶¶ 15, 17, Ex. 1 at 10-12 (Albert Report)
161. The minimum an advertiser would expect to pay for Henley to endorse a product or cause in a short-term, Internet-only campaign is \$500,000.	• Albert Decl. ¶ 18, Ex. 1 at 12-13 (Albert Report)
162. According to a survey conducted by Plaintiffs, close to half (48%) of viewers of the Hope and/or Tax Video mistakenly believe Henley endorsed the video(s), or authorized or approved the use of his music in the video(s).	• Poret Decl. ¶ 7, Ex. 1 at 16 (Poret Report)

1 **II. CONCLUSIONS OF LAW**

2 1. When the material facts are not in dispute, the court may grant partial
3 summary judgment on the question of liability. Fed. R. Civ. P. 56(a) and (d);
4 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986);
5 *Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Savings Ass'n*, 310 F.3d 1188, 1194
6 (9th Cir. 2002).

7 2. Where the material facts are not in dispute, fair use is appropriately
8 decided on summary judgment. *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d
9 792, 800 (9th Cir. 2003).

10 3. To establish infringement, two elements must be proven: (1)
11 ownership of a valid copyright, and (2) copying of constituent elements of the work
12 that are original. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361
13 (1991).

14 4. An author who parts legal title in exchange for royalties is a beneficial
15 owner under Section 501(b) of the Copyright Act. 17 U.S.C. § 501(b); *Love v. Mail*
16 *on Sunday*, No. 05-7798 ABC (PJWx), 2006 U.S. Dist. LEXIS 95456, at *28 (C.D.
17 Cal. Aug. 15, 2006).

18 5. The question of fair use is assessed under the four-factor test prescribed
19 by Section 107 of the Copyright Act: (1) the purpose and character of the use; (2)
20 the nature of the copyrighted work; (3) the amount and substantiality of the portion
21 taken; and (4) the effect on the use upon the potential market for, or value of, the
22 copyrighted work. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576-77
23 (1994); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1399
24 (9th Cir. 1997).

25 6. The first factor of the four-part fair use test considers the purpose and
26 character of the use, including whether the use is of a commercial nature or is for
27 nonprofit educational purposes. *Campbell*, 510 U.S. at 578 (citing 17 U.S.C.
28 § 107(1)).

1 7. The question of parody is considered under the first factor of the fair
2 use test. *Id.* at 579-81.

3 8. In order to qualify as a parody for purposes of copyright law, the newer
4 work must comment on or criticize the original. *Id.* at 580; *Dr. Seuss Enters.*, 109
5 F.3d at 1400-01.

6 9. Under the first fair use factor, the crux of the profit/nonprofit
7 distinction is not whether the sole motive of the use is monetary gain, but whether
8 the user stands to profit from exploitation of the copyrighted material without
9 paying the customary price. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471
10 U.S. 539, 562 (1985).

11 10. The second factor of the fair use test concerns the nature of the
12 copyrighted work. *Campbell*, 510 U.S. at 586 (citing 17 U.S.C. § 107(2)).

13 11. The third factor of the fair use test considers the amount and
14 substantiality of the portion used in relation to the copyrighted work as a whole.
15 *Campbell*, 510 U.S. at 586 (citing 17 U.S.C. § 107(3)).

16 12. To qualify as fair use, a parody may take no more of a copyrighted
17 work than is necessary to recall or “conjure up” the object of the parody. *Dr. Seuss*
18 *Enters.*, 109 F.3d at 1400.

19 13. The fourth factor of the fair use test inquires into the effect of the use
20 upon the potential market for or value of the copyrighted work. *Campbell*, 510 at
21 590 (citing 17 U.S.C. § 107(4)).

22 14. Copyright infringement is considered willful where the defendant
23 knowingly infringed or acted with reckless disregard concerning the copyright
24 holder’s rights. *Microsoft Corp. v. E&M Internet Bookstore, Inc.*, No. C 06-06707
25 WHA, 2008 U.S. Dist. LEXIS 4381, at *7 (N.D. Cal. Jan. 22, 2008).

26 15. Section 43(a) of the Lanham Act prohibits the use of any word, term,
27 name, symbol, or device, or any combination thereof that is likely to cause
28 confusion, or to cause mistake, or to deceive as to the affiliation, connection, or

1 association of such person with another person, or as to the origin, sponsorship, or
2 approval of his or her goods, services, or commercial activities by another person.
3 15 U.S.C. § 1125(a)(1)(A).

4 16. In the case of a false endorsement claim by a celebrity, there is no
5 requirement that the name, likeness or any particular attribute of the celebrity be
6 used; rather, any device can be used to invoke the celebrity such that consumers
7 might be confused. 15 U.S.C. § 1125(a)(1)(A); *Waits v. Frito-Lay, Inc.*, 978 F.2d
8 1093, 1106-07 (9th Cir. 1992).

9 17. The use of distinctive sounds can be the basis of a false endorsement
10 claim under the Lanham Act. 15 U.S.C. § 1125(a)(1)(A); *Waits v. Frito-Lay, Inc.*,
11 978 F.2d 1093, 1107 (9th Cir. 1992).

12 18. The use of altered song lyrics can be the basis of a false endorsement
13 claim under the Lanham Act. 15 U.S.C. § 1125(a)(1)(A); *Butler v. Target Corp.*,
14 323 F. Supp. 2d 1052, 1057-59 (C.D. Cal. 2004).

15 19. In evaluating a claim of false endorsement under the Lanham Act, the
16 determinative issue is likelihood of confusion. *Yeager v. Cingular Wireless LLC*,
17 No. 2:07-cv-02517 FCD GGH, 2009 U.S. Dist. LEXIS 113313, at *26-27 (C.D.
18 Cal. Dec. 7, 2009).

19 20. To assess likelihood of confusion, courts in the Ninth Circuit apply the
20 eight-factor test found in *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir.
21 1979), adjusting the factors as appropriate to fit the circumstances of a celebrity
22 case: (1) strength of the plaintiff's mark; (2) relatedness of the goods; (3) similarity
23 of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6)
24 likely degree of purchaser care; (7) defendant's intent in selecting the mark; and (8)
25 likelihood of expansion of the product lines. *Yeager*, 2009 U.S. Dist. LEXIS, at
26 *28; *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1007 (9th Cir. 2001).

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21. Survey evidence may establish actual confusion. *See Thane Int'l, Inc. v. Trek Bicycle Corp.*, 305 F.3d 894, 902 (9th Cir. 2002).

Dated: April 9, 2010

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