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6

7 UNITED STATES DISTRICT COURT  
8 EASTERN DISTRICT OF WASHINGTON

9 ELF-MAN, LLC,

10 Plaintiff,

11 v.  
12

13 RYAN LAMBERSON,

14 Defendants.  
15

Civil Action No. 13-cv-00395 TOR

ELF-MAN'S MOTION TO DISMISS

8/4/14

Without Oral Argument

16 Plaintiff ELF-MAN, LLC, by and through its undersigned counsel of record,  
17 respectfully moves the Court for dismissal with prejudice of all claims asserted in this  
18 case.

19 Plaintiff's undersigned counsel just appeared in this case for the purpose of the  
20 requested dismissal. Based upon analysis of the case at it currently resides before the  
21 Court, Plaintiff moves to dismiss its claims with prejudice, and further unconditionally  
22 asserts that it will not enforce asserted Copyright Registration No. PA 1-823-286, as set  
23 forth in the complaint, against this Defendant for any act occurring to the present date.

24 A motion for voluntary dismissal pursuant to Rule 41(a)(2) should be granted  
25 unless a defendant can show that it will suffer clear legal prejudice as a result of the  
26 dismissal. *Smith v. Lenches*, 263 F.3d 972, 975 (9<sup>th</sup> Cir. 2001); *Stevedoring Servs. of*

1 *Am. v. Armilla Int'l B.V.*, 889 F.2d 919, 921 (9<sup>th</sup> Cir. 1989) (stating that the purpose of  
 2 Rule 41(a)(2) is “to permit a plaintiff to dismiss an action without prejudice so long as  
 3 the defendant will not be prejudiced . . . or unfairly affected by dismissal.”). “Legal  
 4 prejudice does not result merely because the defendant will be inconvenienced by  
 5 having to defend in another forum or where a plaintiff would gain a tactical advantage  
 6 by that dismissal.” *Smith*, 263 F.3d at 976. In this case, Plaintiff seeks dismissal of the  
 7 action with prejudice, thereby removing any possibility of legal prejudice to Defendant.

8 Plaintiff respectfully submits that Defendant’s counterclaims should be  
 9 dismissed for the reasons set forth in Plaintiff’s pending motion to dismiss (Dkt. #37).  
 10 In addition, the dismissal of Plaintiff’s copyright infringement claim also requires  
 11 dismissal of the Defendant’s declaratory judgment counterclaims for noninfringement  
 12 and copyright invalidity and unenforceability. Rule 41(a)(2) provides that an action  
 13 shall not be dismissed against the defendant’s objection unless the counterclaims can  
 14 remain for independent adjudication. A declaratory judgment counterclaim may only be  
 15 brought to resolve an actual controversy under 28 U.S.C. § 2201. The actual  
 16 controversy “must be extant at all stages of review, not merely at the time the complaint  
 17 is filed.” *Preiser v. Newkirk*, 422 U.S. 395, 401, 45 L.Ed.2d 272, 95 S. Ct. 2330 (1975).

18 The dismissal of Plaintiff’s claim and its express statement that it will not  
 19 enforce the asserted copyrights against Defendant divorces the Court of jurisdiction  
 20 over Plaintiff’s counterclaims. No objection by Defendant can enable the Court to retain  
 21 jurisdiction because there is no case or actual controversy and no present basis for  
 22 subject matter jurisdiction. Consequently, the action in its entirety must be dismissed.  
 23 *Paramount Pictures Corp. v. RePlayTV*, 298 F. Supp. 2d 921, 926-927  
 24 (C.D. Cal. 2004); *Interscope Records v. Kimmel*, 2007 U.S. Dist. LEXIS 43966  
 25 (N.D.N.Y. June 18, 2007); see, e.g., *Crossbow Tech., Inc. v. YH Tech.*,  
 26

1 531 F. Supp. 2d 1117, 1123 (N.D. Cal. 2007) (no case or controversy where written  
2 covenant not to sue filed concurrently with the dismissal of claims).

3 While Plaintiff's remaining counterclaims remaining pending, they are subject to  
4 Plaintiff's pending motion to dismiss (Dkt. #37), and should be dismissed for the  
5 reasons set forth therein.

6 For the foregoing reasons, Plaintiff requests that its claims against Defendant be  
7 dismissed with prejudice, and Defendant's claims be dismissed without prejudice,  
8 thereby terminating the case with respect to all parties.

9 RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of June, 2014.

10 s/David A. Lowe, WSBA No. 24,453

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17 Attorneys for Plaintiff Elf-Man, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 13<sup>th</sup> day of June, 2014, a true copy of the foregoing was served via U.S. Mail and email addressed as follows:

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s/Jeremy Black