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6 **UNITED STATES DISTRICT COURT**  
 7 **NORTHERN DISTRICT OF CALIFORNIA**

8 Case No. 5:19-cv-00585-VKD

9 CLAUDIA ECKELMANN,  
 10 Plaintiff,  
 11 v.  
 12 HIGBEE & ASSOCIATES,  
 13 Defendant.

**NOTICE OF MOTION AND  
 MOTION TO DISMISS FOR  
 FAILURE TO STATE A CLAIM**

**Filed and Served Concurrently:**

- 1. Declaration of Ryan E. Carreon
- 2. [Proposed] Order

Judge: Virginia K. DeMarchi  
 Courtroom: 2, 5<sup>th</sup> Floor  
 Hearing Date: April 2, 2019  
 Time: 10:00 a.m.

17 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

18 PLEASE TAKE NOTICE that on April 2<sup>nd</sup>, 2019 at 10:00 a.m. or as soon thereafter  
 19 as the matter may be heard in the courtroom of the Honorable Virginia K.  
 20 DeMarchi of the above-titled court, located at Courtroom 2, 5th Floor of the San  
 21 Jose Courthouse, 280 South 1st Street, San Jose, CA 95113, Defendant Higbee &  
 22 Associates will move for an Order for dismissing the complaint filed by Plaintiff  
 23 Claudia Eckelmann in its entirety with prejudice, pursuant to Federal Rules of Civil  
 24 Procedure 12(b)(6) for failure to state a claim. If the Court is inclined to grant the  
 25 motion without leave to amend, Higbee & Associates would also request leave to  
 26 file a motion for attorneys fees pursuant to 17 U.S.C. § 505 as the prevailing party.

27 This Motion is brought on the grounds that the complaint filed Plaintiff

1 Eckelmann fails to state any cognizable claim because no case or controversy exists  
2 between Eckelmann and Higbee & Associates.

3 Notice of this Motion was served on Defendants by mail. *See Attached Proof*  
4 *of Service.*

5 This Motion is based on this Notice of Motion and Motion to dismiss, the  
6 attached memorandum of points and authorities, the declaration of Ryan E. Carreon  
7 in support, and the pleadings, files and other materials that are on file with the  
8 Court or may be presented at the hearing.

9  
10 DATED: February 20, 2019

Respectfully submitted,

11 /s/ Ryan E. Carreon  
12 Ryan E. Carreon, Esq.  
13 Cal. Bar No. 311668  
14 **HIGBEE & ASSOCIATES**  
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19 *Counsel for Plaintiff*  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Non-party CartoonStock Ltd. (“CartoonStock”) owns a searchable database of over 500,000 humorous and political cartoons, cartoon pictures and illustrations by more than 1000 of the world's top cartoonists, all available for licensing and download. Utilizing an intellectual property management company, PicRights Ltd. (“PicRights”), CartoonStock discovered that one of its protected works (the “Work”) was being used by Plaintiff Claudia Eckelmann without permission or record of a license.

In November of 2018, CartoonStock and PicRights retained Defendant Higbee & Associates, an intellectual property law firm, to send a cease and desist letter to Eckelmann and to request payment of a retroactive license for unauthorized use of the Work. On November 14, 2018 Higbee & Associates sent a letter stating, in part, that if Eckelmann did not have a valid license, “we believe the use of the [W]ork is a violation of The Copyright Act, Title 17 of the United States Code.”

After many attempts to resolve the matter, the parties could not come to a resolution and, on January 11, 2019, Higbee & Associates considered the matter closed. On January 18, 2019 Eckelmann filed a small claims action in the Superior Court for the County of Martinez, Case no. MSC19-0072 (the “Superior Court Action”). The Superior Court Action named Higbee & Associates as the sole defendant.

On the Pleading form under the section labeled “[w]hy does the defendant owe the plaintiff money,” Eckelmann stated:

“The defendant [Higbee & Associates] is claiming that [plaintiff Eckelmann] owes \$500. This action is deemed to adjudicate that claim.”

On the Pleading form under the section labeled “[w]hen did this happen,” Eckelmann listed November 14, 2018, which is the date that Higbee & Associates sent the letter to Eckelmann alleging copyright infringement.

On January 29, 2019, the Clerk of the Court mailed notice of the Superior



1 Constitution. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, (1937). In general,  
2 there must be a "substantial controversy, between parties having adverse legal  
3 interests, of sufficient immediacy and reality," *Maryland Casualty Co. v. Pacific*  
4 *Coal & Oil Co.*, 312 U.S. 270, 273 (1941), which has "crystallized to the point that  
5 there is a specific need" for a declaratory judgment. *J.N.S., Inc. v. Indiana*, 712 F.2d  
6 303, 305 (7th Cir 1983).

7 Rule 8 of the Federal Rules of Civil Procedure requires only "a short and  
8 plain statement of the claim showing that the pleader is entitled to relief." A motion  
9 to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal sufficiency  
10 of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In considering  
11 whether the complaint is sufficient to state a claim, the court must accept as true all  
12 of the factual allegations contained in the complaint. *Ashcroft v. Iqbal*, 556 U.S.  
13 662 (2009). While a complaint need not allege detailed factual allegations, it "must  
14 contain sufficient factual matter, accepted as true, to 'state a claim to relief that is  
15 plausible on its face.'" *Iqbal*, 129 S.Ct. at 1949 (quoting *Bell Atlantic Corp. v.*  
16 *Twombly*, 550 U.S. 544, 570). A claim is facially plausible when it "allows the  
17 court to draw the reasonable inference that the defendant is liable for the  
18 misconduct alleged." *Iqbal*, 129 S.Ct. at 1949.

19 In this case, the allegations in the allegations in Eckelmann's complaint  
20 certainly stretch the bounds of "short and plain" and fail to adequately state a claim  
21 for relief against Higbee & Associates. Eckelmann's allegations arise directly out of  
22 the November 14, 2018 letter alleging copyright infringement of CartoonStock's  
23 Work. In the letter to Eckelmann, Higbee & Associates stated in part that "we  
24 believe the use of the [W]ork is a violation of The Copyright Act, Title 17 of the  
25 United States Code" and requested that Eckelmann pay a retroactive license fee. In  
26 the Superior Court Complaint, Eckelmann stated that event giving rise to her claim  
27 occurred on November 14, 2018, the date of the letter asserting copyright  
28 infringement. Eckelmann also stated that Higbee & Associates alleged that

1 Eckelmann owed \$500, and stated that the Superior Court Complaint “is deemed to  
2 adjudicate that claim.” In other words, Eckelmann’s suit seeks declaratory relief as  
3 to whether she engaged in copyright infringement as alleged in Higbee &  
4 Associates’ November 14, 2018 letter and therefore whether she owes the  
5 retroactive licensing fee to CartoonStock.

6 Higbee & Associates is not the party asserting copyright infringement, nor is  
7 it the party and requesting the retroactive license fee. Rather, Higbee & Associates  
8 is simply hired counsel seeking payment of a retroactive licensing fee on behalf of  
9 its client, CartoonStock. While Eckelmann certainly may have “adverse legal  
10 interests” against CartoonStock, the copyright holder to the Work, no justiciable  
11 “case or controversy” exists between Eckelmann and Higbee & Associates, the sole  
12 defendant to Eckelmann’s complaint.

13 Even if the allegations in Eckelmann’s complaint are broadly construed to  
14 state a claim for relief arising out of something other than copyright infringement, it  
15 still must fail. California courts are clear that claims against attorneys arising out of  
16 demand letters are protected by the litigation privilege. *See e.g. Malin v.*  
17 *Singer* (2013) 217 Cal.App.4th 1283, 1298-1299 (where extortion claim based on  
18 an attorney demand letter did not constitute criminal conduct as a matter of law, it  
19 was protected by the litigation privilege and subject to dismissal under the anti-  
20 SLAPP statute.) Because attorney demand letters are absolutely protected by the  
21 litigation privilege, any amendment to the claims against Higbee & Associates  
22 would be futile.

23 Because no justiciable case or controversy exists between Eckelmann and  
24 Higbee & Associates, Eckelmann’s complaint fails to state a claim for relief and  
25 must be dismissed. Eckelmann cannot cure her deficient pleading by way of  
26 amendment, and thus her complaint must be dismissed with prejudice.

#### 27 **IV. HIGBEE & ASSOCIATES WOULD REQUEST LEAVE TO FILE A 28 MOTION FOR ATTORNEYS’ FEE**

Under the Copyright Act, the court, in its discretion, may “award a

1 reasonable attorney's fee to the prevailing party as part of the costs.” 17 U.S.C. §  
2 505. This rule also applies to claims for declaratory relief based on the Copyright  
3 Act. *See Shloss v. Sweeney*, 515 F.Supp.2d 1083, 1085 (N.D. Cal. 2007)(awarding  
4 fees to author who brought action for declaratory judgment pursuant to Copyright  
5 Act). As stated above, Eckelmann’s complaint essentially seeks a declaration of  
6 non-infringement because it arises out of a demand letter sent to Eckelmann  
7 requesting payment of a retroactive license based on an alleged copyright  
8 infringement. Therefore, if Higbee & Associates, the sole defendant in this action,  
9 prevails on the instant Motion and is dismissed from the case, it would rightly be  
10 considered the “prevailing party” and could properly seek an award of attorneys’  
11 fees.

12 Thus, if the Court were inclined to grant Higbee & Associates’ Motion, it  
13 would request leave to file a Motion for Attorneys fees against Eckelmann as the  
14 prevailing party.

15 **V. CONCLUSION**

16 Defendant Higbee & Associates respectfully requests that Plaintiff Claudia  
17 Eckelmann’s complaint be dismissed with prejudice and that it be granted leave to  
18 file a motion for attorneys’ fees.

19 Dated: February 20, 2019

Respectfully submitted,

21 **/s/ Ryan E. Carreon**

Ryan E. Carreon, Esq.,

22 Cal. Bar. No. 311668

**HIGBEE & ASSOCIATES**

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26 *Counsel for Plaintiff*

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**PROOF OF SERVICE**

I, the undersigned, say:

I am a citizen of the United States and I am a member of the Bar of this Court. I am over the age of 18 and not a party to the within action My business address is 1504 Brookhollow Dr., Ste 112, Santa Ana, California, 92705.

On February 20, 2019, I caused to be served the foregoing documents:

**Notice of Motion and Motion to Dismiss; Declaration of Ryan E. Carreon;  
[Proposed] Order**

X On the date of execution of this declaration, I caused to be served the documents described above on all parties in this action by placing a true copy thereof enclosed in a sealed envelope and mailing it to the following address:

Claudia Eckelmann  
82 Diablo View Drive  
Orinda, California 94563

I certify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on February 20, 2019, at Santa Ana, California.

/s/ Leah J. Banks  
Leeah J. Banks