**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

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|---|---|---|
| **Daniel R. Castro** | § | |
| **Plaintiff** | § | |
| | § | |
| | § | |
| **v.** | § | **CIVIL ACTION NO: 10CA695** |
| | § | |
| | § | |
| | § | |
| **ENTREPRENEUR MEDIA, INC.** | § | |
| **Defendant** | § | |



## NOTICE OF DISMISSAL

Now Comes Plaintiff, Daniel R. Castro ("Castro") and files this Notice of Dismissal and would show unto the court as follows:

Pursuant to Rule 41(a)(1), Castro hereby voluntarily dismisses the following causes of action seeking: (1) declaratory judgment that the "nominative fair use" doctrine bars EMI's infringement action; (2) declaratory judgment that the doctrine of "acquiescence" bars EMI's infringement action; (3) declaratory judgment that the doctrine of "estoppel" bars EMI's infringement action; (4) declaratory judgment that the "incontestability" provisions of the Lanham Act (15 USC 1065 and 1115(b)) are unconstitutional *on their face; and* (5) declaratory judgment that the doctrine of "fair use" protects Castro's use of the mark "Entrepreneur.Ology" *as a trademark.* Castro does not dismiss his "fair use" claims as set forth in the remainder of his complaint. Nor does Castro dismiss his claim that his use of the mark "Entrepreneur.Ology" is protected by the First Amendment, by the Anticybersquatting Consumer Protection Act, by his "senior use," by common law, because it is "inherently distinct," and because it is not "inherently deceptive" or confusing.

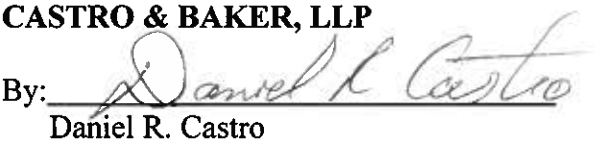
Rule 41(a)(1) allows a plaintiff to dismiss all or part of its claims *without leave of court* before the defendant files either an answer or a motion for summary judgment. *See Crawley, LLC v. Trans-Net, Inc.* 2010 U.S. App. LEXIS 18406 (5$^{TH}$ Cir. 2010). EMI has not filed either an answer or a

motion for summary judgment. Therefore, this Notice is effective to non-suit the above referenced claims without leave of court.

In *Crawley*, the Fifth Circuit held, "The language of Rule 41(a)(1) is unequivocal. It permits a plaintiff to dismiss an action 'without order of court.'" In a separate case, the Fifth Circuit also held that, "The filing of *notice itself closes the file*. There is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play. This is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court. There is not even a perfunctory order of court closing the file. It is alpha and omega was the doing of the plaintiff alone." *See American Cyanamid Co. v. McGhee*, 317 F.2d 295, 297 (5th Cir. 1963)(emphasis added).

If EMI disagrees with Castro's right to dismiss these claims without leave of court, then in the alternative, Castro hereby seeks leave to dismiss these defenses under Rule 41(a)(2). Because it has not filed an answer and no discovery has occurred, and there is not even a scheduling order in place, EMI is not prejudiced by this dismissal. *See Crawley*, at *3.

Respectfully submitted,
**CASTRO & BAKER, LLP**

By: 

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**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of this pleading was filed with the Clerk of the Court using CM/ECF system, which will send a notification of a Notice of Electronic Filing to the following counsel of record on December 15 2010:

| | |
|---|---|
| | William G. Barber<br>Pirkey Barber, LLP<br>600 Congress Avenue, Suite 2120<br>Austin, Texas 78701 |

Daniel R. Castro