

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF OKLAHOMA

**WARNER BROS. RECORDS INC., a  
Delaware corporation; CAPITOL  
RECORDS, INC., a Delaware corporation;  
UMG RECORDINGS, INC., a Delaware  
corporation; SONY BMG MUSIC  
ENTERTAINMENT, a Delaware general  
partnership; ARISTA RECORDS LLC, a  
Delaware limited liability company; and  
BMG MUSIC, a New York general  
partnership,**

Case No. Civ -06-00793-VML

Plaintiffs,

v.

**TALLIE STUBBS,**

Defendant.

**MOTION TO DISMISS WITHOUT PREJUDICE**

Plaintiffs Warner Bros. Records Inc., et al. ("Plaintiffs"), by and through their counsel, respectfully request this court dismiss the above named matter pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure and in support thereof state as follows:

1. Rule 41(a)(2) allows a plaintiff, with the court's permission and subject to the terms the court deems proper, to dismiss an action without prejudice at any time. See 26 Fed. R. Civ. P. 41(a)(2). Indeed, "[t]he very purpose of Rule 41(a)(2) is to allow the District Court, in its discretion, to dismiss an action without prejudice even after responsive pleadings have been filed by the defendant." Hamilton v. Firestone Tire & Rubber Co., Inc., 679 F.2d 143, 146 (9th Cir. 1982).

2. Plaintiffs respectfully request that the Court not only dismiss Plaintiffs' claims against Defendant, but also dismiss Defendant's sole counterclaim against Plaintiffs for declaratory judgment of non-infringement under Rule 12(b)(1).

3. After Plaintiffs' claims are dismissed, the Court would lack subject matter jurisdiction over the counterclaim. This is because no actual case or controversy would remain. Dismissal is appropriate under Rule 12(b)(1) when the district court lacks subject matter jurisdiction over the claim. Fed. R. Civ. P. 12(b)(1) & 12(h)(3); *Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995). The party invoking the court's jurisdiction bears the burden to come forward with competent proof and to show by a preponderance of the evidence that jurisdiction exists. *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 797-98 (10th Cir. 2002); *see also Thomson v. Gaskill*, 315 U.S. 442, 446 (1942) (when a party moves for dismissal pursuant to Rule 12(b)(1), the nonmoving party must support its allegations with competent proof of jurisdictional facts).

4. Even assuming, for purposes of argument, that there is an actual controversy and, thus, jurisdiction over Plaintiffs, "the exercise of that jurisdiction rests within the sound discretion of the district court." *Fina Research, S.A. v. Baroid Ltd.*, 141 F.3d 1479, 1481 (Fed. Cir. 1998). Under the circumstances presented here, the Court should exercise its "unique and substantial" discretion to decline to hear Defendant's counterclaim for declaratory relief. *See Serco Servs. Co., L.P. v. Kelley Co., Inc.*, 51 F.3d 1037, 1039 (Fed. Cir. 1995) (court may dismiss declaratory judgment action if its action is based on "a reasoned judgment whether the investment of time and resources will be worthwhile").

5. Counsel for Plaintiffs left Counsel for Defendant a message regarding this motion, but has not yet heard back from Defendants counsel as of the filing of this motion.

WHEREFORE Plaintiffs respectfully request the Court to dismiss their claims with prejudice and dismiss as moot Defendant's declaratory judgment counterclaim with each party to bear its own fees and costs.

Respectfully submitted,

August 24, 2006

By: s/ Colin G. Martin

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing **PLAINTIFFS' MOTION TO DISMISS WITHOUT PREJUDICE** was served upon counsel for the defendant in the above entitled case via First Class United States mail, with postage fully paid, on the 24<sup>th</sup> day of August, 2006.

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s/ Colin G. Martin  
Colin G. Martin

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and

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