

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

A.V.E.L.A., INC.,

Plaintiff,

-against-

THE ESTATE OF MARILYN
MONROE, LLC and DOES 1
THROUGH 10

Defendants.

THE ESTATE OF MARILYN
MONROE, LLC,

Counter-Claimant,

-against-

A.V.E.L.A., INC., LEO VALENCIA, IPL,
INC., X ONE X MOVIE ARCHIVE INC.,
and V. INTERNATIONAL FINE ARTS
PUBLISHING, INC.,

Counter-Defendants.

X ONE X
MOVIE ARCHIVE, INC.,

Counter-Claimant,

-against-

THE ESTATE OF MARILYN
MONROE, LLC, AUTHENTIC BRANDS
GROUP, LLC, JAMES SALTER,
LEONARD GREEN & PARTNERS, L.P.

Counter-Defendants.

Case No. 1:12-cv 4828-KPF-JCF

ECF Case

**ANSWER OF X ONE X MOVIE
ARCHIVE, INC. TO FIRST
AMENDED COUNTERCLAIM,
AND RELATED
COUNTERCLAIMS/THIRD-
PARTY CLAIMS; DEMAND FOR
JURY TRIAL**

**ANSWER OF X ONE X MOVIE ARCHIVE, INC. TO THE ESTATE OF
MARILYN MONROE, LLC'S FIRST AMENDED COUNTERCLAIM**

For the answer and affirmative defenses of Counter-Defendant X One X Movie Archive, Inc. (hereinafter, "Counter-Defendant") to The Estate of Marilyn Monroe, LLC ("EMMLLC")'s First Amended Counterclaim (Dkt. 133) (the "Counterclaim"), Counter-Defendant respectfully states and avers as follows:

Nature of the Action

Answering the "Nature of the Action" paragraph, Counter-Defendant admits that this is an action for federal and common law unfair competition, false association, trademark infringement and federal and statutory dilution, with pendant claims for deceptive business practices, tortious interference of contract, and intentional interference with prospective economic advantage under New York statutory and common law; however, Counter-Defendant does not admit the substance of any of the allegations stated therein except as expressly stated below. Counter-Defendant admits EMMLLC seeks without limitation actual damages, profits, attorneys' fees, costs and injunctive relief; however, Counter-Defendant denies that EMMLLC is entitled to any such relief (or any other relief). Except as so expressly admitted, Counter-Defendant denies the remaining allegations contained in this paragraph.

The Parties

1. Answering paragraph 1 of the Counterclaim, Counter-Defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of EMMLLC's Counterclaims, and on that basis denies said allegations.

2. Answering paragraph 2 of the Counterclaim, Counter-Defendant admits that Leo Valencia ("Valencia") is an individual residing in San Diego, California. Except as so expressly admitted, Counter-Defendant denies the remainder of the allegations contained in paragraph 2 of

EMMLLC's counterclaims.

3. Answering paragraph 3 of the Counterclaim, Counter-Defendant admits that AVELA is a Nevada corporation with a place of business at 1135 Terminal Way, #209, Reno, Nevada, 89502 and that AVELA conducts business in New York, New York and is subject to personal jurisdiction in this Court in this matter. Except as so expressly admitted, Counter-Defendant denies the remainder of the allegations set forth in paragraph 3 of EMMLLC's Counterclaim.

4. Answering paragraph 4 of the Counterclaim, Counter-Defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of EMMLLC's Counterclaim, and on that basis denies said allegations.

5. Answering paragraph 5 of the Counterclaim, Counter-Defendant admits that X One X Movie Archive, Inc. ("X One X") is a Nevada corporation with a place of business at 1135 Terminal Way, #209, Reno, Nevada, 89502. Except as so expressly admitted, Counter-Defendant denies the remainder of the allegations contained in paragraph 5 of EMMLLC's Counterclaim.

6. Answering paragraph 6 of the Counterclaim, Counter-Defendant admits that V International Fine Arts Publishing, Inc. has offices at 2647 Gateway Road #105-550, Carlsbad, California 92009. Except as so expressly admitted, Counter-Defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of EMMLLC's Counterclaims, and on that basis denies said allegations.

JURISDICTION AND VENUE

7. Answering paragraph 7 of the Counterclaim, Counter-Defendant admits these allegations.

8. Answering paragraph 8 of the Counterclaim, Counter-Defendant admits these allegations.

9. Answering paragraph 9 of the Counterclaim, Counter-Defendant admits that the Court has personal jurisdiction over AVELA. Except as so expressly admitted, Counter-Defendant denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 9, and on that basis denies said allegations.

10. Answering paragraph 10 of the Counterclaim, Counter-Defendant denies the allegations set forth in paragraph 10 of EMMLLC's Counterclaim.

11. Answering paragraph 11 of the Counterclaim, Counter-Defendant denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 11, and on that basis denies said allegations.

FACTUAL BACKGROUND

EMMLLC's (Alleged) Intellectual Property Rights

12. Answering paragraph 12 of the Counterclaim, Counter-Defendant admits said allegations.

13. Answering paragraph 13 of the Counterclaim, Counter-Defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13, and on that basis denies said allegations.

14. Answering paragraph 14 of the Counterclaim, Counter-Defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14, and on that basis denies said allegations.

15. Answering paragraph 15 of the Counterclaim, Counter-Defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in

paragraph 15, and on that basis denies said allegations.

16. Answering paragraph 16 of the Counterclaim, Counter-Defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16, and on that basis denies said allegations.

17. Answering paragraph 17 of the Counterclaim, Counter-Defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17, and on that basis denies said allegations.

18. Answering paragraph 18 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 18 of EMMLLC's Counterclaim.

19. Answering paragraph 19 of the Counterclaim, Counter-Defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 19, and on that basis denies said allegations.

20. Answering paragraph 20 of the Counterclaim, Counter-Defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 20, and on that basis denies said allegations.

21. Answering paragraph 21 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 21, and on that basis denies said allegations.

Leo Valencia and His Alleged Alter Egos

22. Answering paragraph 22 of the Counterclaim, Counter-Defendant admits Leo Valencia owns two businesses that license images, including images of Marilyn Monroe and other celebrities, for use in connection with merchandise including apparel and glassware. Except as so expressly admitted, Counter-Defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 22, and on that basis

denies said allegations.

23. Answering paragraph 23 of the Counterclaim, Counter-Defendant admits Leo Valencia owns two businesses: A.V.E.L.A., Inc. and X One X Movie Archives, Inc. Except as so expressly admitted, Counter-Defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 23, and on that basis denies said allegations.

24. Answering paragraph 24 of the Counterclaim, Counter-Defendant denies that X One X is an alter ego of Leo Valencia.

25. Answering paragraph 25 of the Counterclaim, Counter-Defendant admits that Valencia is the sole shareholder, officer, director, and employee of X One X. Except as so expressly admitted, Counter-Defendant denies the remaining allegations contained in paragraph 25.

26. Answering paragraph 26 of the Counterclaim, Counter-Defendant admits that Valencia uses a laptop and cell phone, and that he does not use separate laptop and separate cell phones for each business. Counter-Defendant denies the remaining allegations contained in paragraph 26.

27. Answering paragraph 27 of the Counterclaim, Counter-Defendant admits that businesses owned by Valencia license and/or sub-license some of the same intellectual property. Except as so expressly admitted, Counter-Defendant denies the allegations contained in paragraph 27.

28. Answering paragraph 28 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 28.

29. Answering paragraph 29 of the Counterclaim, Counter-Defendant admits that V.

International is a licensing agent for AVELA. Except as so expressly admitted, Counter-Defendant denies the remaining allegations contained in paragraph 29.

30. Answering paragraph 30 of the Counterclaim, Counter-Defendant admits that several of V. International employees have had email addresses with the extension @avela.net. Except as so expressly admitted, Counter-Defendant denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 30, and on that basis denies said allegations.

31. Answering paragraph 31 of the Counterclaim, Counter-Defendant admits that Melissa Woo, prior counsel of record for AVELA and Valencia, identified herself as “in-house counsel” for AVELA. Except as so expressly admitted, Counter-Defendant denies the remaining allegations contained in paragraph 31.

32. Answering paragraph 32 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 32.

33. Answering paragraph 33 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 33.

The Counter-Defendant’s Alleged Wrongful Acts

34. Answering paragraph 34 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 33.

35. Answering paragraph 35 of the Counterclaim, Counter-Defendant admits that it has not been granted permission or a license by EMMLLC to sub-license, manufacture, distribute, market or sell any product. Except as so expressly admitted, Counter-Defendant denies the remaining allegations contained in paragraph 35.

36. Answering paragraph 36 of the Counterclaim, Counter-Defendant denies the

allegations contained in paragraph 36.

37. Answering paragraph 37 of the Counterclaim, Counter-Defendant admits that a true and correct copy of the June 2, 2011 letter AVELA received from EMMLC is attached as Exhibit A to EMMLC's Counterclaim. Except as so expressly admitted, Counter-Defendant denies the remaining allegations contained in paragraph 37.

38. Answering paragraph 38 of the Counterclaim, Counter-Defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 38, and on that basis denies said allegations.

39. Answering paragraph 39 of the Counterclaim, Counter-Defendant admits that a true and correct copy of the June 16, 2011 letter is attached as Exhibit B to EMMLC's Counterclaim. Except as so expressly admitted, Counter-Defendant denies the remainder of the allegations contained in paragraph 39.

40. Answering paragraph 40 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 40 of EMMLC's Counterclaim.

41. Answering paragraph 41 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 41 of EMMLC's Counterclaim.

42. Answering paragraph 41 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 42 of EMMLC's Counterclaim.

43. Answering paragraph 43 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 43 of EMMLC's Counterclaim.

44. Answering paragraph 44 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 44 of EMMLC's Counterclaim.

45. Answering paragraph 45 of the Counterclaim, Counter-Defendant denies the

allegations contained in paragraph 45 of EMMLLC's Counterclaim.

46. Answering paragraph 46 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 46 of EMMLLC's Counterclaim.

47. Answering paragraph 47 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 47 of EMMLLC's Counterclaim.

48. Answering paragraph 48 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 48 of EMMLLC's Counterclaim.

49. Answering paragraph 49 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 49 of EMMLLC's Counterclaim.

50. Answering paragraph 50 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 50 of EMMLLC's Counterclaim.

51. Answering paragraph 51 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 51 of EMMLLC's Counterclaim.

First Cause of Action

(False Association and Unfair Competition – 15 U.S.C. §1125(a))

52. Answering paragraph 52 of the Counterclaim, Counter-Defendant incorporates its responses to paragraphs 1 through 51 as if set forth fully herein.

53. Answering paragraph 53 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 53 of EMMLLC's Counterclaim.

54. Answering paragraph 54 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 54 of EMMLLC's Counterclaim.

55. Answering paragraph 55 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 55 of EMMLLC's Counterclaim.

56. Answering paragraph 56 of the Counterclaim, paragraph 56 is a conclusion of law to which no response is required. To the extent a response is required, Counter-Defendant denies the allegations contained in paragraph 56 of EMMLLC's Counterclaim.

57. Answering paragraph 57 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 57 of EMMLLC's Counterclaim.

58. Answering paragraph 58 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 58 of EMMLLC's Counterclaim.

59. Answering paragraph 59 of the Counterclaim, Paragraph 59 is a conclusion of law to which no response is required. To the extent a response is required, Counter-Defendant denies the allegations contained in paragraph 59 of EMMLLC's Counterclaim.

60. Answering paragraph 60 of the Counterclaim, Paragraph 60 is a conclusion of law to which no response is required. To the extent a response is required, Counter-Defendant denies the allegations contained in paragraph 60 of EMMLLC's Counterclaim.

Second Cause of Action

(Trademark Infringement – 15 U.S.C. § 1114 and Common Law)

61. Answering paragraph 61 of the Counterclaim, Counter-Defendant incorporates its responses to paragraphs 1 through 60 as if set forth fully herein.

62. Answering paragraph 62 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 62 of EMMLLC's Counterclaim.

63. Answering paragraph 63 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 63 of EMMLLC's Counterclaim.

64. Answering paragraph 64 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 64 of EMMLLC's Counterclaim.

65. Answering paragraph 65 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 65 of EMMLLC's Counterclaim.

66. Answering paragraph 66 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 66 of EMMLLC's Counterclaim.

67. Answering paragraph 67 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 67 of EMMLLC's Counterclaim.

68. Answering paragraph 68 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 68 of EMMLLC's Counterclaim.

Third Cause of Action

(Dilution – 15 U.S.C. §1125(c) and N.Y. Gen. Bus. L. §360-1)

69. Answering paragraph 69 of the Counterclaim, Counter-Defendant incorporates its responses to paragraphs 1 through 68 as if set forth fully herein.

70. Answering paragraph 70 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 70 of EMMLLC's Counterclaim.

71. Answering paragraph 71 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 71 of EMMLLC's Counterclaim.

72. Answering paragraph 72 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 72 of EMMLLC's Counterclaim.

73. Answering paragraph 73 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 73 of EMMLLC's Counterclaim.

74. Answering paragraph 74 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 74 of EMMLLC's Counterclaim.

75. Answering paragraph 75 of the Counterclaim, Counter-Defendant denies the

allegations contained in paragraph 75 of EMMLLC's Counterclaim.

76. Answering paragraph 76 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 76 of EMMLLC's Counterclaim.

Fourth Cause of Action

(Common Law Unfair Competition)

77. Answering paragraph 77 of the Counterclaim, Counter-Defendant incorporates its responses to paragraphs 1 through 76 as if set forth fully herein.

78. Answering paragraph 78 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 78 of EMMLLC's Counterclaim.

79. Answering paragraph 79 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 79 of EMMLLC's Counterclaim.

80. Answering paragraph 80 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 80 of EMMLLC's Counterclaim.

81. Answering paragraph 81 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 81 of EMMLLC's Counterclaim.

Fifth Cause of Action

(Deceptive Business Practices - N.Y. Gen. Bus. Law § 349)

Answering paragraphs 82 through 87 of the Counterclaim, Counter-Defendant avers that EMMLLC's Fifth Cause of Action has been dismissed.

82. Answering paragraphs 82 through 87 of the Counterclaim, Counter-Defendant incorporates its responses to paragraphs 1 through 81 as if set forth fully herein.

83. Answering paragraph 83 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 83 of EMMLLC's Counterclaim.

84. Answering paragraph 84 of the Counterclaim, Counter-Defendant denies the

allegations contained in paragraph 84 of EMMLLC's Counterclaim.

85. Answering paragraph 85 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 85 of EMMLLC's Counterclaim.

86. Answering paragraph 86 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 86 of EMMLLC's Counterclaim.

87. Answering paragraph 87 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 87 of EMMLLC's Counterclaim.

Sixth Cause of Action

(Tortious Interference with Existing Contractual Relationships)

Answering paragraphs 88 through 96 of the Counterclaim, Counter-Defendant avers that EMMLLC's Sixth Cause of Action has been dismissed.

88. Answering paragraph 88 of the Counterclaim, Counter-Defendant incorporates its responses to paragraphs 1 through 87 as if set forth fully herein.

89. Answering paragraph 89 of the Counterclaim, Counter-Defendant denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 89, and on that basis deny said allegations.

90. Answering paragraph 90 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 90 of EMMLLC's Counterclaim.

91. Answering paragraph 91 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 91 of EMMLLC's Counterclaim.

92. Answering paragraph 92 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 92 of EMMLLC's Counterclaim.

93. Answering paragraph 93 of the Counterclaim, Counter-Defendant denies the

allegations contained in paragraph 93 of EMMLLC's Counterclaim.

94. Answering paragraph 94 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 94 of EMMLLC's Counterclaim.

95. Answering paragraph 95 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 95 of EMMLLC's Counterclaim.

96. Answering paragraph 96 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 96 of EMMLLC's Counterclaim.

Seventh Cause of Action

(Intentional Interference with Prospective Economic Advantage)

97. Answering paragraph 97 of the Counterclaim, Counter-Defendant incorporates its responses to paragraphs 1 through 96 as if set forth fully herein.

98. Answering paragraph 98 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 98 of EMMLLC's Counterclaim.

99. Answering paragraph 99 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 99 of EMMLLC's Counterclaim.

100. Answering paragraph 100 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 100 of EMMLLC's Counterclaim.

101. Answering paragraph 101 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 101 of EMMLLC's Counterclaim.

102. Answering paragraph 102 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 102 of EMMLLC's Counterclaim.

103. Answering paragraph 103 of the Counterclaim, Counter-Defendant denies the allegations contained in paragraph 103 of EMMLLC's Counterclaim.

AFFIRMATIVE DEFENSES

**FIRST AFFIRMATIVE DEFENSE
(Laches, Waiver, Estoppel)**

104. EMMLLC has been aware of the existence of an actual and justiciable controversy as set forth in EMMLLC's Counterclaim.

105. Despite EMMLLC's apparent knowledge of an actual and justiciable controversy between the parties, EMMLLC has taken no action until the filing of the counterclaim to vindicate its alleged rights.

106. By virtue of the foregoing, EMMLLC's counterclaims are barred by the doctrines of waiver, laches, and/or estoppel.

**SECOND AFFIRMATIVE DEFENSE
(Bad Faith, Unclean Hands)**

107. EMMLLC filed the Counterclaim in retaliation for the claims asserted against it by AVELA.

108. By virtue of EMMLLC's bad faith acts as set forth in Counter-Defendant's counter-complaint, EMMLLC's counterclaims are thereby barred.

109. By virtue of the foregoing, EMMLLC's counterclaims are also barred by the doctrine of unclean hands.

**THIRD AFFIRMATIVE DEFENSE
(Failure to State a Claim for Relief)**

110. The EMMLLC counterclaims fail to state a claim upon which relief can be granted and should be barred under Fed. Rule Civ. Pr. 12(b)(6).

**FOURTH AFFIRMATIVE DEFENSE
(Statute of Limitations)**

111. The EMMLLC counterclaims are barred by the applicable statute of limitations.

**FIFTH AFFIRMATIVE DEFENSE
(Illegality)**

112. The EMMLLC counterclaims are barred by the doctrine of illegality.

113. Plaintiff's claims are barred on the grounds of improper or illegal use of the alleged intellectual property rights designed to achieve anti-competitive results or to violate the antitrust laws of the state of New York, Nevada and/or the United States.

**SIXTH AFFIRMATIVE DEFENSE
(Fraud)**

114. The EMMLLC counterclaims are barred by the doctrine of fraud, including without limitation fraud on the United States Patent and Trademark Office.

**SEVENTH AFFIRMATIVE DEFENSE
(Lack of Standing, Fractured Ownership)**

115. EMMLLC lacks standing to assert its counterclaims.

116. Specifically, EMMLLC is not the complete, rightful owner of the "alleged Marilyn Monroe Intellectual Property," as defined by EMMLLC in its First Amended Counterclaim.

117. Because the Estate does not own the foregoing rights, the Estate has no standing from which to assert the claims it has asserted against X One X in its Counterclaim.

**EIGHTH AFFIRMATIVE DEFENSE
(Failure to Mitigate)**

118. To the extent that EMMLLC has suffered any damage, which Counter-Defendant specifically denies, EMMLLC is barred from recovery for its failure to mitigate and/or avoid such alleged damages.

**NINTH AFFIRMATIVE DEFENSE
(Fair Use and First Amendment)**

119. Counter-Defendant's alleged use of EMMLLC's purported intellectual property, as defined in the Counterclaim, is protected as fair use and also as an exercise of Counter-Defendant's First Amendment rights. Counter-Defendant (and third parties) are free to describe, refer to, display, or otherwise identify and mention Marilyn Monroe based on the well-established doctrine of fair use and the First Amendment of the United States Constitution.

**TENTH AFFIRMATIVE DEFENSE
(Failure to Join Indispensable Parties)**

120. The EMMLLC counterclaims are barred by its failure to join necessary and indispensable parties.

**ELEVENTH AFFIRMATIVE DEFENSE
(No Valid Rights to Name, Likeness, Image, or Persona)**

121. EMMLLC is not the owner of a Right of Publicity for Marilyn Monroe and is judicially estopped by *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309 (S.D.N.Y. 2007) and *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F. 3d 983 (9th Cir. 2012) from claiming otherwise.

122. Further, EMMLLC does not have a valid trademark in the persona, image, or likeness of Marilyn Monroe.

**TWELFTH AFFIRMATIVE DEFENSE
(No Valid Trademarks)**

123. EMMLLC's claims are barred in whole or in part because EMMLLC does not have a valid trademark in some or all of the works at issue.

**THIRTEENTH AFFIRMATIVE DEFENSE
(Cancellation of Trademarks)**

124. EMMLLC's trademark applications for the registrations listed in Paragraph 16 of its First Amended Counterclaim were false, misleading and fraudulent in material respects, and the applications were submitted with the intent to defraud the United States Patent and Trademark Office. Thus, the certificates of registration were falsely obtained, and should be cancelled and removed from the Principal Register forthwith pursuant to 15 U.S.C. §§ 1064(3) and 1119.

125. Additionally, EMMLLC's trademark registrations are functional, and additionally these trademarks lack distinctiveness. Thus, the registrations should be cancelled and removed from the Principal Register forthwith pursuant to 15 U.S.C. §§ 1052(e), 1052(f), 1064(3), and 1119.

**FOURTEENTH AFFIRMATIVE DEFENSE
(Trademark Abuse)**

126. EMMLLC's claims are barred because it has engaged in misuse and abuse of its registered trademarks.

**FIFTEENTH AFFIRMATIVE DEFENSE
(Lawful, Valid Competition)**

127. At all relevant times, Counter-Defendant has acted in a reasonable, lawful manner amounting to valid competition.

**SIXTEENTH AFFIRMATIVE DEFENSE
(Aesthetic Functionality)**

128. Counter-Defendant's use of images of Marilyn Monroe and the word "Marilyn" on products is aesthetically functional.

129. The images and name have never been used as source identifiers.

**SEVENTEENTH AFFIRMATIVE DEFENSE
(Public Policy)**

130. EMMLLC's claims are barred as contrary to public policy.

**EIGHTEENTH AFFIRMATIVE DEFENSE
(Copyright Act)**

131. EMMLLC's claims are also inconsistent the Copyright Act and the Supreme Court's holding in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

**NINETEENTH AFFIRMATIVE DEFENSE
(Non-Use)**

132. EMMLLC's claims are barred because Counter-Defendant does not use EMMLLC's purported trademarks.

**TWENTIETH AFFIRMATIVE DEFENSE
(Reservation of Affirmative Defenses Not Yet Known)**

133. Counter-Defendant has insufficient information upon which to form a belief as to whether it may have additional unstated affirmative defenses; Counter-Defendant consequently hereby reserves the right to assert additional affirmative defenses in the event discovery indicates that the same is appropriate.

COUNTERCLAIMS/THIRD-PARTY CLAIMS

Counter-Defendant X One X Movie Archive, Inc. (“X One X”) hereby alleges its counter-claims/third-party claims against The Estate of Marilyn Monroe, LLC (“EMMLLC”), Authentic Brands Group, LLC (“ABG”, collectively referred to herein with EMMLLC as the “ABG Parties”), James Salter (“Salter”), and Leonard Green & Partners, L.P. (“Leonard Green & Partners”) as follows:

PARTIES

1. X One X is a corporation duly organized and existing under the laws of the State of Nevada with its principal place of business at 1135 Terminal Way, #209, Reno, Nevada 85902. X One X is in the business of, *inter alia*, creating new artistic works in print, graphic and lithographic mediums. X One X obtains copyrights registered with the United States Copyright Office for its artistic works and licenses these artistic works to third parties.

2. On information and belief, EMMLLC is a Delaware limited liability company with its principal place of business at 100 West 33rd Street, Suite 1007, New York, New York 10001. X One X is further informed and believes and on that basis alleges that EMMLLC is the alter ego of ABG.

3. On information and belief, ABG is a Delaware limited liability company with its principal place of business at 100 West 33rd Street, Suite 1007, New York, New York 10001.

4. On information and belief, Salter is an individual residing in New York, New York who conducts business and is subject to personal jurisdiction, in New York, New York and is the Chief Executive Officer of both ABG and EMMLLC.

5. On information and belief, Leonard Green & Partners is a limited partnership organized under the laws of Delaware with a principal place of business at 11111 Santa Monica

Boulevard, Suite 2000, Los Angeles, CA 90025 who conducts business, and is subject to personal jurisdiction, in New York, New York. Leonard Green & Partners is a private equity firm and owner of a variety of retailers and major retail chains.

JURISDICTION AND VENUE

6. X One X's counter-claims are brought under the federal Copyright Act, 17 U.S.C. § 101 *et. seq.*, the Lanham Act and trademark laws of the United States, 15 U.S.C. §1051 *et. seq.*, and New York statutory and common law, providing this Court with subject matter jurisdiction over such claims pursuant to 28 U.S.C. §§ 1331, 1338(a), and 1367. In addition, this Court has subject matter jurisdiction over X One X's counter-claims arising under the Sherman Act pursuant to 15 U.S.C. § 4. Lastly, X One X, ABG Parties, Salter, and Leonard Green & Partners are citizens of different states.

7. This Court has personal jurisdiction over the ABG Parties, Salter, and Leonard Green & Partners because those parties: (a) are headquartered/maintain offices or reside in this judicial district; (b) transact and solicit business in the State of New York within this judicial district; (c) engage in the sale of merchandise to consumers in the State of New York; and/or (d) have committed tortious acts within the State of New York which the ABG Parties, Salter and Leonard Green & Partners knew or should have known would cause injury to X One X in the State of New York.

8. X One X's counter-claims arise out of transactions and occurrences that are the subject matter of EMLLC's claims herein, and none of those counter-claims require the introduction into this action of any third party over whom this Court cannot exercise jurisdiction. Therefore X One X's counter-claims may be asserted pursuant to Federal Rule of Civil Procedure ("FCRP") 13 and under the Declaratory Judgment Act at 28 U.S.C. §§ 2201, 2202.

9. X One X joins ABG, Leonard Green & Partners, and Salter pursuant to FRCP 19 and Rule 20 because: (1) ABG, Leonard Green & Partners, and Salter's actions underlie the majority of the critical events in the present action; (2) this Court cannot accord complete relief among existing parties without the addition of ABG, Leonard Green & Partners, and Salter as parties; (4) X One X asserts rights arising from the same disputed intellectual property rights at issue in this action; and (5) X One X's claims concern common questions of law and fact at issue in the present action.

10. Venue is proper pursuant to 28 U.S.C. §§ 1391(b), (c), and (d) because the ABG Parties, Leonard Green & Partners, and Salter: (a) are headquartered/maintain offices in or reside in and are subject to jurisdiction in this judicial district; (b) transact and solicit business in the State of New York within this judicial district; and/or (c) a substantial part of the events or omissions that form the basis of X One X's counter-claims against the ABG Parties, Leonard Green & Partners, and Salter occurred in this judicial district.

ALTER EGO CLAIMS

11. X One X is informed and believes, and on that basis alleges, EMMLLC is dominated and controlled by ABG in such a way that EMMLLC was and is in essence an alter ego of ABG. Specifically, X One X is informed and believes that:

- At all relevant times, EMMLLC was and is a mere corporate shell over which ABG maintains ownership, domination and pervasive control and through which it conducted and conducts its business;
- The ABG Parties share the same address and office space in Manhattan;
- The ABG Parties share the same Chief Executive Officer, James Salter; President, Nick Woodhouse; General Counsel/Chief Operating Officer, Terri DiPaolo; Chief Financial

Officer, Kevin Clarke; Brand Manager/Director of Brand Licensing, Katie Jones; and other officers and managers;

- The ABG Parties do not have any officers or managers distinct from one another, and EMMLLC does not have any employees;
- Written communications sent on behalf of EMMLLC are printed on ABG letterhead.
- ABG represents the purported Marilyn Monroe Intellectual Property at licensing trade shows; and
- EMMLLC functions as a mere facade or instrumentality for ABG.
- ABG deceptively and falsely purports that EMMLLC is the Estate of Marilyn Monroe and/or related to the late Marilyn Monroe herself in order to position itself as the owner of the nonexistent and sham purported "exclusive right" to utilize Marilyn Monroe's name or image in commerce and subsequently secure licensing business for ABG.

12. Based upon the foregoing EMMLLC is, and at all relevant times was, the alter ego of ABG, and recognition of the separate existence of EMMLLC would not promote justice in that it may permit ABG to insulate itself from liability for injuries it caused X One X to suffer as a result of its improper conduct. Accordingly, the fiction of the ABG Parties' separate existence must be disregarded, and ABG should be liable for and required to fully comply with the terms of any and all judgments entered against EMMLLC in the same manner and to the same degree as EMMLLC. Further X One X is informed and believes and based thereon alleges that all Counterdefendants were acting in furtherance of a conspiracy or agreement to undertake the wrongful conduct as alleged herein, and/or acting as agents for each other, so that each is legally responsible for the actions of others.

LEGAL BACKGROUND

13. Marilyn Monroe, the legendary American actress, singer, and model died in August 1962.

14. Marilyn Monroe did not apply for or receive any trademarks during her lifetime.

15. Monroe bequeathed her personal effects and money to various family and friends in her Last Will & Testament, and Monroe divided the rest, residue and remainder of her estate between: 1. Monroe's personal secretary (\$40,000); 2. Monroe's psychiatrist Dr. Marianne Kris (twenty five percent interest); and 3. Monroe's acting coach Lee Strasberg (the remaining balance, or seventy five percent interest). Monroe did not bequeath any intellectual property rights. Neither Dr. Marianna Kris nor Lee Strasberg applied for or received any trademarks related to Marilyn Monroe during their lifetime. Dr. Marianne Kris died in 1980, and Lee Strasberg died in 1982.

16. Anna Strasberg, widow of acting coach Lee Strasberg, as administratrix of Marilyn Monroe's estate, and Aaron Frosch, the executor of Monroe's estate, registered design trademarks for images of Marilyn Monroe's stylized signature for various classes in 1988 and 1995 (Reg. Nos. 1509758 and 1889730, respectively). In 1998, Anna Strasberg, as administratrix, registered the word mark "Marilyn Monroe" for various classes (Reg. No. 2180950). In 1999, Anna Strasberg, as "executor" of Monroe's estate, registered the word mark "Marilyn Monroe" for various classes (Reg. No. 2223599).

17. Marilyn Monroe's estate closed in 2001. Upon information and belief, an entity called "Marilyn Monroe LLC" was subsequently formed in 2001.

18. In 2005, Marilyn Monroe LLC registered the word mark "Marilyn Monroe" for various classes (Reg. No. 2985935).

19. In 2008, the Central District of California in *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, 568 F.Supp.2d 1152 (2008) and the Southern District of New York in *Shaw Family Archives, Ltd. v. CMG Worldwide, Inc.*, 486 F.Wupp.2d 309 (2008) (collectively, the “Monroe Litigation”) respectively determined Marilyn Monroe LLC was estopped from asserting that it held valid and enforceable post mortem rights to Marilyn Monroe’s persona, identity or likeness and that *no such rights existed* because Monroe was domiciled in New York at the time of her death and any such rights belonging to Monroe terminated upon her death.

20. Upon information and belief, in 2010, ABG acquired Marilyn Monroe LLC and formed a subordinate entity called “MM-ABG LLC.”

21. In 2011, MM-ABG LLC registered a US Class 47 (wines) and US Class 49 (Distilled alcoholic liquors) word mark “Marilyn” (Reg. No. 4040943).

22. Upon information and belief, at some point ABG decided to rename the entity MM-ABG LLC “The Estate of Marilyn Monroe LLC” which entity now purports to be the owner of the Contested Marks and which entity uses its name to falsely and fraudulently imply that it is the estate of Marilyn Monroe – when it is not – in order to further its illegal scheme to monopolize any and all uses of Marilyn Monroe’s name, image and/or likeness (both with the public at large and, separately, within the judicial system itself) and to prevent members of the public (including X One X, A.V.E.L.A, Inc. (“AVELA”) and others) from: (a) using, licensing and marketing public domain images of Marilyn Monroe; and (b) using copyrighted images of Marilyn Monroe owned by anyone other than EMMLLC.

23. In 2012, in *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 1000 (9th Cir. 2012), the Ninth Circuit confirmed the holding in the 2008 Monroe Litigation that Monroe’s right of publicity did not survive her because Monroe died domiciled in the State

of New York, which does not recognize postmortem rights of publicity.

24. In 2013, EMMLLC registered the word mark “Marilyn Monroe” for various classes (Reg. Nos. 4336364 and 4419275).

25. In 2014, EMMLLC registered the word mark “Marilyn Monroe” for various classes (Reg. Nos. 4487208, 4487210, and 4511420).

26. In 2015, EMMLLC registered the word mark “Marilyn Monroe” for various classes (Reg. No. 4743834, together with the trademarks identified by Reg. Nos. 1509758, 1889730, 2180950, 2223599, 2985935, 4040943, 4336364, 4419275, 4487208, 4487210, and 4511420 described in paragraphs 16, 18, 21, 24, and 25 above, the “Contested Marks”). All of the Contested Marks are currently owned by EMMLLC, located at 100 West 33rd Street, Suite 1007, New York, NY 10001 with the exception of Reg. No. 4040943, which is currently owned by “MM-ABG, LLC,” located at 100 West 33rd Street, Suite 1007, New York, NY 10001.

FACTS UNDERLYING COUNTERCLAIMS

27. The ABG Parties do not have exclusive rights to intellectual property related to Marilyn Monroe.

28. Marilyn Monroe was one of the most photographed women of the 20th century, and dozens (if not hundreds) of photographers and/or entities purport to own copyrights in images of Monroe. Additionally, many photographs of the long-deceased Monroe are within the public domain.

29. Other entities own trademark and copyright rights in Monroe’s films and characters. Other entities and individuals own federally registered trademarks in the name “Marilyn” and even in “Norma Jeane.”

30. Salter has attempted to prevent X One X’s owner, Leo Valencia (“Valencia”)

from showing and selling X One X's artwork featuring Marilyn Monroe's image at licensing trade shows. Salter publicly confronted Valencia at a licensing trade show and told Valencia, in front of potential X One X licensees, that Valencia is a "bootlegger," that Salter "owns Marilyn Monroe," and that Salter has told major retailers not to do business with X One X or Valencia. Salter has told licensing agents and various entities that X One X and Valencia do not have any rights to sell artwork featuring Monroe's image and not to do business with X One X or Valencia. Salter has publicly and privately threatened to shut down X One X and Valencia's licensing of artwork featuring Marilyn Monroe's image.

31. The Contested Marks are, in essence, strategic litigation tools by which ABG, under the misleading name "The Estate of Marilyn Monroe, LLC," purports to exercise exclusive ownership of the right to exploit Marilyn Monroe's image, likeness and name in commerce, despite judicial precedent establishing that no such right exists. The Contested Marks form the basis for the ABG Parties' representations that it owns sweeping rights in any and all uses of Marilyn Monroe's image, likeness, name and persona.

32. Relying on the Contested Marks, the ABG Parties threaten and intimidate other entities (including without limitation X One X, AVELA and others) in an effort to discourage and prevent their lawful use of Marilyn Monroe's image, likeness and/or name in commerce. Specifically, in an attempt to gain a monopoly over every use of Marilyn Monroe's image, likeness and/or name in commerce, the ABG Parties misuse the Contested Marks to allege that the images X One X licenses are illegal and to otherwise further the attempted monopolization of products bearing the image, likeness and/or name of Marilyn Monroe. The ABG parties' claims and threats in this regard are a sham, and are asserted in bad faith to further their monopolistic ambitions.

33. Continued registration of the Contested Marks will damage X One X's business by preventing it and other legitimate competitors from lawfully licensing artistic works utilizing Marilyn Monroe's image, likeness and/or name and from creating products from those works for sale to consumers.

34. Additionally, under 15 U.S.C. § 1052(a) some or all of the Contested Marks unlawfully and falsely suggest a connection between EMMLLC and Marilyn Monroe.

FIRST CAUSE OF ACTION

Cancellation of Trademark Registrations under 15 U.S.C. §§ 1052(f), 1064(3), 1119 [Lack of Distinctiveness]

35. X One X repeats and realleges each and every allegation of paragraphs 1-34, above, as if fully set forth herein.

36. X One X seeks cancellation of the Contested Marks on grounds that they lack distinctiveness.

37. The Contested Marks are generic terms that identify a deceased person. They lack distinctiveness in that they do not identify the source or origin of any product. At most, the Contested Marks remind consumers of the famous historical figure Marilyn Monroe, but do not signify any connection at all in the minds of consumers or the relevant public between the ABG Parties and the iconic celebrity.

38. The Contested Marks have not acquired distinctiveness through substantially exclusive and continuous use because countless non-parties have used Marilyn Monroe's name and/or image in commerce both before and since the ABG Parties use of the Contested Marks in commerce. As a result, the general and relevant public does not identify the Contested Marks with a source or origin or identify them with either EMMLLC or ABG.

39. X One X has been and will continue to be damaged if the registrations of the

Contested Marks are not cancelled, as these purported marks form the basis for EMLLC's meritless claims of false association, infringement, dilution, unfair competition, and intentional interference with prospective economic advantage. Continued registration of the Contested Marks will additionally damage X One X's business by preventing it and other legitimate competitors from lawfully licensing artistic works utilizing Marilyn Monroe's image, likeness and/or name and from creating products from those works for sale to consumers.

40. Based on the facts alleged hereinabove, the Contested Marks lack distinctiveness and should be cancelled pursuant to 28 U.S.C. §§ 2201-2202, 15 U.S.C. 1052(f), 1064(3), and 1119. X One X seeks cancellation of the following registrations in the following classes: Reg. Nos. 1509758 for all classes; 1889730 for all classes; 2180950 for all classes; 2223599 for all classes; 2985935 for all classes; 4040943 for all classes; 4336364 for all classes; 4419275 for all classes; 4487208 for all classes; 4487210 for all classes; 4511420 for all classes; and 4743834 for all classes.

SECOND CAUSE OF ACTION

**Cancellation of Trademark Registrations under 15 U.S.C §§ 1052(e), 1064(3), 1119
[Functionality]**

41. X One X repeats and realleges each and every allegation of paragraphs 1-40, above, as if fully set forth herein.

42. The appearance of Marilyn Monroe's name, likeness and/or stylized signature in the Contested Marks is purely functional; Monroe's name/or stylized signature, as well as Monroe's image, at most may provide some aesthetic appeal to consumers and serve as a product feature. Marilyn Monroe's name as used to describe the famous actress is part of the public domain. Marilyn Monroe's name, likeness and/or stylized signature does not indicate source or origin, but rather is at most an appealing ornamental design on the products themselves and a

means by the consuming public (and/or X One X) of free expression. As such, the Contested Marks are not eligible for trademark protection.

43. Products bearing Marilyn Monroe's name, image, likeness and/or stylized signature are sold under countless brand names by countless entities independent of the ABG Parties or their predecessors.

44. If not cancelled, the ABG Parties will continue to utilize the Contested Marks to prevent or interfere with X One X's licensing of any artistic works that incorporate an image of Marilyn Monroe or reference Monroe in an aesthetic design. The ABG Parties seek to prevent every use of Marilyn Monroe's image, likeness or name by X One X. This result would significantly disadvantage X One X by effectively preventing X One X from competing with numerous entities licensing or selling products bearing Monroe's image, likeness, and/or name.

45. X One X has been and will continue to be damaged if the registrations of the Contested Marks are not cancelled, as these purported marks form the basis for EMLLC's meritless claims of false association, infringement, dilution, unfair competition, and intentional interference with prospective economic advantage.

46. Based on the facts alleged hereinabove, the Contested Marks are purely functional and should be cancelled pursuant to 28 U.S.C. §§ 2201 and 2202 and 15 U.S.C. §§ 1052(e), 1119 and 1064(3). X One X seeks cancellation of the following registrations in the following classes: Reg. Nos. 1509758 for all classes; 1889730 for all classes; 2180950 for all classes; 2223599 for all classes; 2985935 for all classes; 4040943 for all classes; 4336364 for all classes; 4419275 for all classes; 4487208 for all classes; 4487210 for all classes; 4511420 for all classes; and 4743834 for all classes.

THIRD CAUSE OF ACTION

**Third Ground for Trademark Cancellation under 15 U.S.C §§ 1064(3), 1119
[Fraud]**

47. X One X repeats and realleges each and every allegation of paragraphs 1-46, above, as if fully set forth herein.

48. On information and belief, in applying for the Contested Marks to the United States Patent and Trademark Office (“USPTO”), the ABG Parties and their predecessors averred under oath that “no other person, firm, or corporation, or association has the right to use the [Contested Marks] in commerce, either in the identical form thereof or in such near resemblance thereto as may be likely when used in connection with the goods or service of such other person, to cause confusion or to cause mistake, or to deceive.”

49. The above-quoted statement was knowingly false in that, at the time of filing their respective applications, the ABG Parties and their predecessors were fully aware that numerous other entities have used identical or substantially similar marks in commerce since the time of Monroe’s death and continuing to the present day, that registering the Contested Marks would necessarily cause confusion, mistake or deceive consumers, and that the Contested Marks are not distinctive of the ABG Parties or their predecessors in commerce.

50. X One X is informed and believes and based thereon alleges that the ABG Parties and their predecessors, when applying for trademark registration and prior to issuance of various registrations, falsely and fraudulently claimed use of the various Marilyn Monroe marks for goods and/or services where no such trademark use had yet been made, thereby resulting in the false and fraudulent issuance of trademark registrations.

51. The ABG Parties and their predecessors deliberately included false representations as to their purported rights to use the Contested Marks with the express intent of

inducing the USPTO to grant registration of the Contested Marks.

52. In reasonable reliance upon the false representations of the ABG Parties and their predecessors, the USPTO granted registration of the Contested Marks.

53. X One X has been and will continue to be damaged if the registrations of the Contested Marks are not cancelled, as these purported marks form the basis for EMMLLC's meritless claims of false association, infringement, dilution, unfair competition, and intentional interference with prospective economic advantage.

54. Based on the facts alleged hereinabove, the Contested Marks are subject to cancellation for fraud pursuant to 28 U.S.C. §§ 2201 and 2202 and under 15 U.S.C §§ 1064(3) and 1119. X One X seeks cancellation of the following registrations in the following classes: Reg. Nos. 1509758 for all classes; 1889730 for all classes; 2180950 for all classes; 2223599 for all classes; 2985935 for all classes; 4040943 for all classes; 4336364 for all classes; 4419275 for all classes; 4487208 for all classes; 4487210 for all classes; 4511420 for all classes; and 4743834 for all classes.

FOURTH CAUSE OF ACTION

Attempted Monopolization of Trade or Commerce in Violation of the Sherman Act under 15 U.S.C. § 2

55. X One X repeats and realleges each and every allegation of paragraphs 1-54, above, as if fully set forth herein.

56. The ABG Parties have unlawfully attempted to monopolize the market of products bearing the image, likeness and/or name of Marilyn Monroe by asserting a putative right of publicity not recognized by controlling law. The ABG Parties falsely and continuously claim to own “Rights of Publicity and Persona Rights” in Marilyn Monroe to prevent other merchants from lawfully selling Marilyn Monroe-related products. They persist in this fictional

right by misleadingly and falsely indicating that EMMLLC is actually Marilyn Monroe's estate or its representatives. The ABG Parties' actions have been undertaken despite, and in contradiction to, judicial precedent establishing that they may not assert postmortem rights of publicity regarding Marilyn Monroe.

57. Marilyn Monroe's image, likeness and name are so unique that there is no practical substitute for either Monroe's image, likeness or name on a product. Fans of Monroe or consumers purchasing products with Marilyn Monroe's image, likeness and/or name have no adequate substitute products for those that bear Monroe's image, likeness and/or name. These consumers' purchase of Marilyn Monroe-related products is a highly selective and subjective choice. Monroe reinvented the concept of "celebrity" and remains an icon of unparalleled caliber. Monroe's image, likeness and/or name have distinct customers and distinct uses.

58. Products bearing Marilyn Monroe's image, likeness and/or name are marketed and/or advertised as products related to Marilyn Monroe; for example, a t-shirt is advertised as a "Marilyn Monroe t-shirt" or "Marilyn Monroe poster" rather than merely a "t-shirt." Generally, products are not advertised in a trademark sense, such as MARILYN MONROE® brand t-shirt, or MARILYN MONROE™ brand posters. Regardless of the brand (i.e., trademark) that Marilyn Monroe related-products are sold under (and such products *are* sold under countless brand names by countless companies), in the vast majority of instances, the image, likeness and/or name of Marilyn Monroe is not being used as a trademark, but rather as an ornamental design on the products themselves (or as a means of advertising and/or marketing goods and services by using Marilyn Monroe's image, likeness and/or name in a non-trademark manner).

59. ABG claims to be the exclusive licensor of products bearing Marilyn Monroe's image, likeness and name and seeks to prevent any use of Marilyn Monroe's image, likeness and

name on all products in the market absent its consent. Salter and ABGs' attempted monopolization of the market of Marilyn Monroe-related products prevents any other entity from lawfully using Marilyn Monroe's image, likeness or name in commerce and unlawfully discourages registered copyright holders and those who want to use public domain images of Marilyn Monroe.

60. As Salter has stated, Salter and ABGs' aim is to control all uses of Marilyn Monroe's image, likeness and name in commerce and to consolidate all Marilyn Monroe-related products under ABG's own "roof." Towards this end, the ABG Parties have sent of dozens cease and desist letters intended to prevent merchants from lawfully selling Marilyn Monroe-related products, including merchants X One X licenses images to. ABG uses sham "threatening lawyer's letters" as part of its business strategy.

61. ABG sends sham cease and desist letters regardless of whether entities utilize any purported trademarks owned by EMMLLC, but rather ABG threatens sham legal action over any use of any image of Marilyn Monroe, or use of her name, on any goods or in connection with any services. ABG sends cease and desist letters where neither ABG nor EMMLLC owns valid trademark rights in the disputed products. These unlawful threats of sham litigation have the effect of deterring lawful competition in the marketplace and have undermined and interfered with X One X's ability to license its Marilyn Monroe images (as well as X One X's licensees' ability to market products bearing an image of Marilyn Monroe).

62. ABG, at Salter's authorization, deceptively and falsely purports that EMMLLC is the Estate of Marilyn Monroe and/or related to the late Marilyn Monroe herself in order to position itself as: 1) the rightful owner of sweeping intellectual property rights in Marilyn Monroe; and 2) the owner of the nonexistent purported "exclusive right" to utilize Marilyn

Monroe's image, likeness and name in commerce. ABG and Salter then coerce retailers and licensees not to purchase Marilyn Monroe-related products from competing entities.

63. On information and belief, ABG manages the website www.marilynmonroe.com, which purports to be a website for Marilyn Monroe's fans but directs visitors to purchase products licensed by the ABG Parties. ABG sends baseless cease and desist letters in an attempt to prevent other individuals and entities from registering or maintaining websites related to Marilyn Monroe in an effort to direct Marilyn Monroe fans to purchase products licensed by the ABG Parties.

64. ABG has attempted to prevent lawful copyright owners, including X One X, from competing in the market of Marilyn-Monroe related products. ABG requires photographers and artists who own copyrights in images of Marilyn Monroe to pay ABG licensing fees to continue to compete in the market of Marilyn Monroe-related products. ABG subsequently gains control as a licensor over these copyright owners and their use of images of Monroe despite litigation determining that copyright owners may lawfully sell and use Monroe's image without approval from the ABG Parties' predecessors and that Monroe's persona is within the public domain. (*See the Monroe Litigation.*)

65. ABG either threatens sham litigation and/or abuses the litigation process in EMMLLC's name to unlawfully enforce its attempted monopoly over Marilyn Monroe-related products, including naming X One X as a Counter-Defendant in the instant litigation. This litigation, including the counterclaim against X One X (and the other counter-defendants) is a sham filed in bad faith in order to achieve Salter and the ABG Parties' unlawful goal of monopolizing the market for goods and services that use the image, likeness and/or name of Marilyn Monroe.

66. X One X has been directly injured by ABG and Salter, who have falsely advised licensees of X One X's images that the ABG Parties own exclusive rights to Marilyn Monroe's image and that X One X and X One X's owner, Valencia, do not own rights in X One X-licensed images of Monroe, resulting in lost licensing opportunities for X One X. ABG and Salter have unlawfully coerced licensees and retailers not to license from X One X or do business with X One X or other competing entities.

67. On information and belief, ABG has sought to create a vertical scheme with its affiliate Leonard Green & Partners. ABG is partially owned by Leonard Green & Partners. Under this partnership arrangement, ABG assures licensees that their ABG-licensed Marilyn Monroe-related products will sell exclusively in retailers owned by Leonard Green & Partners. The effect of these vertical arrangements is to preclude any other lawful competitor, including X One X, from licensing or selling its Marilyn Monroe-related products in the retailers owned by Leonard Green & Partners.

68. On information and belief, Salter specifically authorized, directed and/or participated in ABG's unlawful acts and attempt to gain a monopoly over every use of Marilyn Monroe's image, likeness and/or name in commerce.

69. On information and belief, Salter knowingly authorized, directed and/or participated in ABG's dealings with Leonard Green & Partners in order to preclude lawful competitors from selling Marilyn Monroe-related products in the retailers owned by Leonard Green & Partners.

70. Any judgment tending to validate EMMLLC's claims herein would not only contradict controlling precedent, but would impermissibly grant the ABG Parties monopoly power over any use of Monroe's name or the use of any image of Marilyn Monroe on any article

or in any advertising. Such a monopoly would outlast any period of copyright, would usurp the right of the public (and X One X) to make commercial use of public domain images, and would enable the ABG Parties to unlawfully restrain any use of Marilyn Monroe's image, likeness or name in commerce. The monopoly would eliminate all competitive uses regardless of whether other entities used any common law or registered trademark purportedly owned by EMMLLC, or whether the source of the product bearing Marilyn Monroe's image, likeness or name is clearly identified as originating from a third party. The monopoly would create a barrier to entry for any entities attempting to compete in the market and result in a restriction on lawful competition in the market. The monopoly would be against public policy and would restrain the market by requiring consumers to purchase all Marilyn Monroe-related products from the ABG Parties. . Given Salter and the ABG Parties' exclusionary conduct and misleading and unlawful actions, a dangerous probability exists that the ABG Parties will achieve monopoly power in the market of Marilyn Monroe-related products unless restrained.

71. The ABG Parties contend that *any* use of Monroe's image, likeness or name results in a likelihood of confusion in violation of the Lanham Act, including the instant litigation where EMMLLC contends counter-defendants' mere use of Monroe's image and/or use of the name "Marilyn" is in violation of the Lanham Act. Thus, the ABG Parties' monopoly power would prevent all other entities or individuals (including X One X) from using Monroe's image, likeness or name in commerce and foreclose all competition. Such litigation is a sham and based on the patently false allegation that EMMLLC is "the exclusive owner of those rights in and to Marilyn Monroe's identity, persona, name and likeness arising under common law and/or statute."

72. As a direct and proximate result of ABG, Leonard Green & Partners, and Salters'

unlawful attempt to monopolize trade as hereinabove alleged, X One X has been and will continue to be damaged by ABG, Leonard Green & Partners, and Salters' continued attempts to monopolize the market of Marilyn Monroe-related products, in an amount to be proved at trial; ABG, Leonard Green & Partners, and Salters' misconduct is willful and malicious, and otherwise sufficiently egregious to warrant the imposition of punitive, exemplary and/or treble damages against ABG, Leonard Green & Partners, and Salter and in favor of X One X.

FIFTH CAUSE OF ACTION
(Deceptive Business Practices – N.Y. Gen. Bus. Law § 349)

73. X One X repeats and realleges each and every allegation of paragraphs 1-72, above, as if fully set forth herein.

74. On information and belief, ABG acquired the entity "Marilyn Monroe LLC" in December 2010. A corporation called "MM-NJ" was then formed in October, 2010, and MM-NJ was renamed "MM-ABG, LLC" on October 21, 2010. The entity "MM-ABG, LLC" dropped the reference to ABG and was renamed "The Estate of Marilyn Monroe, LLC" in April 2011.

75. On information and belief, ABG intentionally chose the name "The Estate of Marilyn Monroe, LLC" for its purported subsidiary to make consumers, licensees, and merchants believe that EMMLLC is the actual estate of the late Marilyn Monroe and/or that the ABG Parties have a relationship with the estate and/or the late Marilyn Monroe that somehow affords them a monopoly over the use of Marilyn Monroe's image, likeness and name.

76. On information and belief, the ABG Parties send baseless cease and desist letters to merchants and other legitimately-operating entities purporting to be the estate of Marilyn Monroe, in an effort to deceive those entities into either entering into license agreements with the ABG Parties or to cease selling lawfully made products; so too, the ABG Parties have, in the past, and/or continue to require their licensees to include disclaimers which further falsely imply

that EMMLLC owns a Right of Publicity in Marilyn Monroe and is the only legitimate source for licensing Marilyn Monroe's image, likeness and name.

77. The ABG Parties interfere with X One X's lawful licensing of its copyright registrations and artwork featuring Marilyn Monroe by falsely claiming (publically and through sham litigation) that EMMLLC is the exclusive owner of rights to all intellectual property relating to Monroe and by falsely purporting to be the estate of Marilyn Monroe.

78. For instance, the ABG Parties continue to advertise and state on product labels and hangtags that "Rights of publicity & Persona are used with permission of The Estate of Marilyn Monroe" to make consumers, licensees, and merchants believe that EMMLLC owns such intellectual property rights when in fact they have been judicially estopped from asserting any right of publicity in Marilyn Monroe.

79. X One X is further undermined and prevented from licensing lawful images of Marilyn Monroe because of the ABG Parties' deceptive entity name "The Estate of Marilyn Monroe LLC" and the ABG-Parties' deceptive claims to ownership of a Right of Publicity in Marilyn Monroe.

80. As a direct and proximate result of the ABG Parties' deceptive business practices as hereinabove alleged, X One X has been damaged and continues to suffer damages, in an amount to be proved at trial. Additionally, the ABG Parties' misconduct is willful, intentional, knowing and malicious, and otherwise sufficiently egregious to warrant the imposition of treble damages and reasonable attorneys' fees and costs incurred in connection with this action against the ABG Parties and in favor of X One X.

SIXTH CAUSE OF ACTION
(Nevada Unfair Trade Practices Act – Nev. Rev. Stat. § 598A.060)

81. X One X repeats and realleges each and every allegation of paragraphs 1-80,

above, as if fully set forth herein.

82. Salter and the ABG Parties have engaged in exclusionary conduct in an attempt to monopolize the relevant market of Marilyn Monroe-related products in violation of Nev. Rev. Stat. § 598A.060. Salter and the ABG Parties have acted with the specific intent to achieve a monopoly in the relevant market of Marilyn Monroe-related products and gain exclusive control over all uses of Monroe's image, likeness and name in commerce. Given Salter and the ABG Parties' misleading and unlawful actions, a dangerous probability exists that the ABG Parties will achieve monopoly power in the market of Marilyn Monroe-related products unless restrained.

83. Salter and ABGs' conduct has caused anticompetitive effects in the market of Marilyn Monroe-related products, including those described above.

84. X One X has been injured and has been threatened with additional injury or damage in its business or property due to Salter and ABGs' conduct.

85. Consumers in the relevant market of Marilyn Monroe-related products have been denied the benefits of lawful competition. The ABG Parties have used unlawful threats and bad faith threats of sham litigation to restrict the menu of choices for consumers and expand its limited purported trademark rights far beyond their actual scope.

86. Upon information and belief, Salter and ABG had and have no legitimate competitive justifications for their practices.

87. Upon information and belief, the sole purpose of Salter and ABGs' conduct (both in the market generally and through sham litigation and threats of sham litigation) was to protect and extend its dominance in the relevant market of Marilyn Monroe-related products and gain exclusive control over all uses of Monroe's image, likeness and name in commerce. Any

purported business justifications for Salter and ABGs' conduct are mere pretext.

88. As a direct and proximate result of Salter and the ABG Parties' exclusionary conduct, misleading and unlawful actions, and deceptive business practices as hereinabove alleged, X One X has been damaged and continues to suffer damages, in an amount to be proved at trial.

SEVENTH CAUSE OF ACTION
(Unfair Competition – Nevada Common Law)

89. X One X repeats and realleges each and every allegation of paragraphs 1-88, above, as if fully set forth herein.

90. Salter and the ABG Parties have used and continue to use their purported common law and statutory trademark rights to unfairly compete with and deter fair competition by its competitors, including X One X.

91. Salter and the ABG Parties have used their purported trademark rights, baseless threats, and deceptive practices, including those described above, to enter into unlawful restraints on competition.

92. As a direct and proximate result of Salter and the ABG Parties' exclusionary conduct, misleading and unlawful actions, and deceptive business practices as hereinabove alleged, X One X has been damaged and continues to suffer damages, in an amount to be proved at trial.

PRAYER FOR RELIEF

WHEREFORE, X One X prays that this Court enter judgment against Counter-Defendants by issuing an Order:

1. Canceling the registrations of the Contested Marks;
2. Permanently restraining and prohibiting the ABG Parties and Salter, their

respective officers, agents, servants, employees and/or all persons acting in concert or participation with them, from falsely representing to X One X's existing or prospective licensees and retailers that they are the sole and exclusive owner of intellectual property relating to Marilyn Monroe, or otherwise interfering with X One X's lawful use of Marilyn Monroe images;

3. Declaring that X One X has not infringed, is not infringing, and is not otherwise liable for any perceived violation of the ABG Parties' alleged rights in and to the name and/or likeness of the late Marilyn Monroe;

4. Declaring that the ABG Parties own no rights in Monroe's persona, likeness, image or identity under Lanham Act 1125(a).

5. Declaring that X One X has not used, and is not using, the ABG Parties' purported trademarks in violation of the Lanham Act;

6. Declaring that X One X has not used, and is not using, Marilyn Monroe images in violation of unfair competition law;

7. Declaring that any rights related to Marilyn Monroe claimed by the ABG Parties do not supersede X One X's valid, enforceable copyrights in and to certain images of the late Marilyn Monroe, and X One X's right to use public domain images of Marilyn Monroe;

8. Declaring that X One X has not interfered with any prospective economic advantage of the ABG Parties;

9. Awarding X One X its reasonable attorneys' fees and costs incurred in defending this action;

10. Awarding X One X actual and punitive damages for the ABG Parties' contractual interference in amounts to be determined at trial;

11. Awarding X One X actual, punitive, exemplary and/or treble damages against

Salter, Leonard Green & Partners, and the ABG Parties for their attempted monopolization in violation of the Sherman Act, the Nevada Unfair Trade Practices Act, and Nevada common law.

12. Awarding X One X interest and costs; and for
13. Such other and further relief as the Court deems just and proper.

Dated: October 30, 2015

By: 

Michael R. Adele
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***Attorney for Plaintiff/Counter-Defendant
A.V.E.L.A, Inc., Counter-Defendant Leo
Valencia, and Counter-
Defendant/Counter-Claimant X One X
Movie Archives, Inc.***

DEMAND FOR JURY TRIAL

Counter-claimant X One X Movie Archives, Inc. hereby demands a trial by jury on all matters so triable

Dated: October 30, 2015



By: _____

Michael R. Adele
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Anaheim, California 92806
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***Attorney for Plaintiff/Counter-Defendant
A.V.E.L.A, Inc., Counter-Defendant Leo
Valencia, and Counter-
Defendant/Counter-Claimant X One X
Movie Archives, Inc.***

CERTIFICATE OF SERVICE

I hereby certify the following: I am over the age of 18 years and am not a party to the above-captioned action. I am a registered user of the CM/ECF system for the United States District Court for the Southern District of New York.

On October 30, 2015, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. To the best of my knowledge, all counsel to be served in this action are registered CM/ECF users and will be served by the CM/ECF system.

I declare under penalties of perjury under the laws of the United States that the foregoing is true and correct.



**MICHAEL R. ADELE (BAR NO. 138339)
TECHNOLOGY LITIGATION CENTER**