

1 Steven James Goodhue (#029288)  
Law Offices of Steven James Goodhue  
2 9375 East Shea Blvd., Suite 100  
Scottsdale, AZ 85260  
3 Telephone: (480) 214-9500  
Facsimile: (480) 214-9501  
4 E-Mail: [sjg@sjgoodlaw.com](mailto:sjg@sjgoodlaw.com)

5 *Attorney for Plaintiff*  
*AF Holdings, L.L.C.*

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7 **IN THE UNITED STATES DISTRICT COURT**  
8 **FOR THE DISTRICT OF ARIZONA**

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10 AF HOLDINGS, L.L.C., a St. Kitts and Nevis  
limited liability company,

11 Plaintiff,  
12 v.

13 DAVID HARRIS,  
14 Defendant.

**CASE NO.: 2:12-CV-02144-PHX-GMS**

**PLAINTIFF’S RESPONSE TO  
DEFENDANT’S MOTION TO  
DISMISS AND CROSS-MOTION TO  
DISMISS DEFENDANT’S  
COUNTERCLAIMS FOR FAILURE  
TO PROSECUTE**

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18 Plaintiff AF Holdings, L.L.C. (“Plaintiff”), through its undersigned counsel, hereby responds  
19 to Defendant’s Motion to Dismiss and assert its Cross–Motion to Dismiss Defendant’s  
20 Counterclaims for failure to prosecute, and in support of this Response and Cross-Motion, states as  
21 follows:

22 **INTRODUCTION**

23 On August 18, 2013, Defendant David Harris filed a motion to dismiss Plaintiff’s complaint.  
24 (ECF No. 90.) In addition, Defendant asked for leave to amend his counterclaims. Plaintiff does not

1 oppose Defendant's request to dismiss its claims. Plaintiff opposes Defendant's request for leave to  
2 amend his counterclaims. Finally, Plaintiff hereby moves to dismiss Defendant's counterclaims for  
3 failure to prosecute.

## 4 DISCUSSION

### 5 I. Plaintiff Does Not Oppose Defendant's Request to Dismiss Plaintiff's Claims

6 Defendant requests the dismissal of Plaintiff's claims. (*See id.* at 5.) Plaintiff does not oppose  
7 Defendant's request. The Court's Order regarding statutory damages (ECF No. 92) has changed  
8 Plaintiff's stance on further litigating this action. For this reason—and not for any of the reasons  
9 stated in Defendant's motion to dismiss—Plaintiff does not oppose Defendant's request to dismiss  
10 Plaintiff's claims.

11 For the record, Plaintiff disputes the ground on which Defendant seeks dismissal, namely, the  
12 notion that 28 U.S.C. § 1404<sup>1</sup> is a bar to the dismissal and refiling of a case in a different district  
13 than where the original action arose. Nothing in the venue statutes suggests that Defendant's legal  
14 arguments have any merit. Nor do any of the cases Defendant cites in his memorandum.

### 14 II. Plaintiff Opposes Defendant's Request to Amend his Counterclaims

15 In the final sentence of his motion to dismiss, Defendant also requests, "Leave of the Court to  
16 Defendant to amend his Counter Claim." (ECF No. 90 at 5:26.) Plaintiff opposes this request. The  
17 Case Management Order issued in this case established a deadline of March 4, 2013 for amending  
18 pleadings and filing supplemental pleadings. (*See* ECF No. 33 at 2:21-23.) Defendant does not  
19 establish (or even attempt to argue) good cause for relief from the Case Management Order. (*See*  
20 ECF No. 90.)

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23 <sup>1</sup> Defendant's citation to 28 U.S.C. § 1404 is inapposite. The venue statute applicable to copyright  
24 actions is 28 U.S.C. § 1400(a). *E.g.*, *Goldberg v. Cameron*, 482 F. Supp. 2d 1136, 1143 (N.D. Cal.  
2007).

1 **III. The Court Should Dismiss Defendant’s Counterclaims for Failure to Prosecute**

2 The Court should dismiss Defendant’s counterclaims for failure to prosecute. To the extent  
3 that Defendant’s counterclaims state a basis for relief, they should be dismissed because Defendant has  
4 taken no action in furtherance of them. He has not taken any discovery, filed dispositive motions or  
5 otherwise prosecuted his claims. Further, Defendant refused to participate in the preparation of the  
6 case management conference; he failed to provide his Rule 26(a) Initial Disclosure Statement; and  
7 he refused to participate in good faith settlement talks. (*E.g.*, ECF No. 29.)

8 It is well-established that district courts possess the authority to manage their dockets and  
9 that this authority includes the power to dismiss a case for failure to prosecute. *See Hells Canyon*  
10 *Preservation Council v. U.S. Forest Service*, 403 F.3d 683, 689 (9th Cir. 2005). In determining  
11 whether to dismiss a claim for failure to prosecute or failure to comply with a court order, the Court  
12 must weigh the following factors: (1) the public’s interest in expeditious resolution of litigation; (2)  
13 the court’s need to manage its docket; (3) the risk of prejudice to defendants/respondents; (4) the  
14 availability of less drastic alternatives; and (5) the public policy favoring disposition of cases on the  
15 merits. *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002).

16 **A. Public’s Interest in Expeditious Resolution of Litigation**

17 “The public’s interest in expeditious resolution of litigation always favors dismissal.”  
18 *Yourish v. California Amplifier*, 191 F.3d 983, 900 (9th Cir. 1999). Given Defendant’s failure to  
19 pursue his counterclaims for over seven months, this factor weighs in favor of dismissal. *Pagtalunan*,  
20 291 F.3d at 639 (finding a failure to pursue a case for almost four months merited dismissal).

21 **B. Court’s Need to Manage its Docket**

22 “It is incumbent upon the Court to manage its docket without being subject to routine  
23 noncompliance of litigants such as [Defendant].” *Id.* In this case, Defendant has taken actions to  
24 avoid compliance with the Court’s orders, including his duty to participate in the case management  
conference and to avoid the gratuitous use of invective. Further, Defendant’s actions have

1 “consumed some of the court’s time that could have been devoted to other cases on the docket.” *Id.*  
2 This factor weighs in favor of dismissal. *Id.*

3 **C. Risk of Prejudice to Defendants/Respondents**

4 Defendant’s dilatory tactics have prejudiced the counterclaim defendant: Plaintiff. Defendant  
5 already admitted to destroying the computer he owned when he was caught infringing on Plaintiff’s  
6 works. Further, information Plaintiff would require to defend itself against Defendant’s  
7 counterclaims—the identifying information of Defendants joint tortfeasors, for example—is  
8 destroyed in the ordinary course of business by Internet Service Providers. (*See, e.g.*, ECF No. 39.)  
9 Finally, there is no clear explanation for why Defendant has exhibited the delay he has.  
10 “Unnecessary delay inherently increases the risk that witness’ memories will fade and evidence will  
become stale.” *Pagtalunan*, 291 at 643. This factor weighs in favor of dismissal.

11 **D. Availability of Less Drastic Alternatives**

12 The Court might consider less drastic alternatives, such as dismissing Defendant’s  
13 counterclaims without prejudice. Other alternatives are unavailing because the issue before the  
14 Court’s is Defendant’s total lack of prosecution, not defiance of a single order or failure to prosecute  
15 a subset of his counterclaims. However, so long as the Court thoughtfully considers less drastic  
16 alternatives, this factor would weigh in favor of dismissal. *Id.* (upholding dismissal notwithstanding  
17 that the district court “did not consider less drastic alternatives....”)

18 **E. Public Policy Favoring Disposition of Cases on Their Merits**

19 Just as the public’s interest in expeditious resolution of litigation will always favor dismissal,  
20 so too will the public policy favoring disposition of cases on their merits always weigh against  
21 dismissal. *Id.* However, in this instance, a cursory overview of the merits of Defendant’s  
22 counterclaims demonstrates that dismissal will not alter the inevitable trajectory of Defendant’s  
23 counterclaims. For example, one of Defendant’s counterclaims is that Plaintiff violated Defendant’s  
24 state constitutional right to privacy by serving Defendant with process via a process server.  
Defendant has no realistic chance of prevailing on this or any of his other counterclaims.

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**CONCLUSION**

The Court should grant Defendant’s motion to dismiss Plaintiff’s claims, deny Defendant’s request for leave to amend his counterclaims and grant Plaintiff’s motion to dismiss Defendant’s counterclaims.

Dated this 3<sup>rd</sup> day of September, 2013

Law Offices of Steven James Goodhue

By: /s/ Steven James Goodhue  
Steven James Goodhue (#029288)  
9375 East Shea Blvd., Suite 100  
Scottsdale, AZ 85260  
*Attorney for Plaintiff*  
*AF Holdings, L.L.C.*

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I hereby certify that on September 3, 2013, I electronically filed the foregoing with the Clerk of the Court for filing and uploading to the CM-ECF.

**A COPY** of the foregoing was mailed (or served via electronic notification if indicated by an “\*”) on September 3, 2013, to:

David Harris\* (troll.assassins@cyber-wizards.com)  
4632 East Caballero Street, #1  
Mesa Arizona 85205

Paul Ticen, Esq.\* (paul@kellywarnerlaw.com)  
Kelly/Warner, PLLC  
404 S. Mill Ave, Suite C-201  
Tempe, Arizona 85281

/s/ Steven James Goodhue