

FILED

San Francisco County Superior Court

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DEC 28 1993

ALAN M. CARLSON, Clerk  
BY: *[Signature]* Deputy Clerk

Attorney for Plaintiffs

182.00

PLAN I

STATUS CONFERENCE DATE: MAY 27 1994 8:30 A.M.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

No. 957460

TOREN SMITH, an individual  
doing business under the fic-  
titious name and style of  
STUDIO PROTEUS,

COMPLAINT FOR DAMAGES ARISING  
FROM BREACH OF CONTRACT, MONEY  
HAD AND RECEIVED, AND  
CONVERSION; AND FOR THE  
IMPOSITION OF A CONSTRUCTIVE  
TRUST

Plaintiff,

vs.

ECLIPSE ENTERPRISES, INC., a  
corporation; DEAN MULLANY, an  
individual; JAN MULLANY, an  
individual; and DOE 1 through  
DOE 20, inclusive,

Defendants.

Plaintiff, TOREN SMITH alleges:

1. At all times mentioned herein, plaintiff, TOREN SMITH,  
was an individual who did business under the fictitious business  
name and style of STUDIO PROTEUS, and who maintained a business  
and residence address in the City of San Francisco, County of San  
Francisco, California ("SMITH").

2. At all times mentioned herein, defendant, ECLIPSE  
ENTERPRISES, INC., was a New York corporation that was duly

1 qualified as a foreign corporation with the California Secretary  
2 of State, and that maintained its principal place of business in  
3 the City of Forestville, County of Mendocino, California  
4 ("ECLIPSE").

5 3. At all times mentioned herein, defendant, DEAN  
6 MULLANY, was an individual who maintained a business and  
7 residence address in the City of Forestville, County of  
8 Mendocino, California ("DEAN").

9 4. At all times mentioned herein, defendant, JAN MULLANY,  
10 was an individual who maintained a business and residence address  
11 in the City of Staten Island, County of Nassau, State of New York  
12 ("JAN").

13 5. The true names and capacities, whether individual,  
14 corporate, associate, or otherwise, of DOE 1 through DOE 20, in-  
15 clusive, are unknown to plaintiffs who, therefore, sue said  
16 defendants by such fictitious names. Plaintiffs are informed and  
17 believe, and thereon allege, that each of such fictitiously-named  
18 defendants is responsible in some manner for the occurrences  
19 herein alleged, and that the damages incurred by plaintiffs, as  
20 hereinafter alleged, were proximately caused by said defendants'  
21 acts. Plaintiffs will amend this Complaint to allege the true  
22 names and capacities of such fictitiously-named defendants when  
23 they are ascertained.

24 6. Plaintiffs are informed and believe, and thereon  
25 allege, that each defendant was and is the agent of each of the  
26 other defendants, and, in doing or omitting to do the things  
27 herein alleged, the defendants were acting in the capacity of and  
28 in the course and scope of that agency.

1           7. Plaintiffs are informed and believe, and thereon  
2 allege, that each of the defendants authorized, consented to,  
3 knew of, and/or ratified each of the acts or omissions to act of  
4 each of the other defendants.

5           8. Plaintiffs are informed and believe, and thereon  
6 alleges, that (i) there is a unity of ownership between DEAN and  
7 JAN, on the one hand, and ECLIPSE, on the other hand, such that  
8 any separateness between DEAN and JAN, on the one hand, and  
9 ECLIPSE, on the other hand, does not and, at all times herein  
10 mentioned, did not exist in that DEAN and JAN completely con-  
11 trolled, dominated, managed, and operated ECLIPSE in a manner so  
12 that ECLIPSE is the *alter ego* of DEAN and JAN; and/or (ii)  
13 ECLIPSE is, and at all times herein mentioned was, a mere shell,  
14 instrumentality, and conduit through which DEAN and JAN carried  
15 on business in a corporate name exercising such complete control  
16 and dominance of the business of ECLIPSE to the extent that the  
17 individuality or separateness of ECLIPSE, on the one hand, and  
18 DEAN and JAN, on the other hand, does not and, at all times  
19 herein mentioned, did not exist.

20           9. On or about February 2, 1988, ECLIPSE made, executed,  
21 and delivered to Seishinsha, Ltd., ("SEISHINSHA") an Agreement  
22 for the exclusive rights to publish the Appleseed comic book  
23 series in the English language, and to otherwise adapt the  
24 Appleseed comic book series for purposes of marketing and selling  
25 same throughout the United States of America, Canada, and Great  
26 Britain (the "Appleseed Author License").

27           10. On or about July 1, 1988, ECLIPSE made, executed, and  
28 delivered to SMITH an Agreement for the Co-Publication of the

1 Appleaseed comic book series pursuant to which SMITH would  
2 translate from Japanese, script into English, and oversee the  
3 lettering of all stories and issues in the Appleaseed comic book  
4 series (the "Appleaseed Co-Publication Agreement").

5 11. On or about September 4, 1992, ECLIPSE entered into an  
6 Agreement pursuant to which it acknowledged the existence of the  
7 Appleaseed Author License and the Appleaseed Co-Publication  
8 Agreement, and assigned certain rights under both contracts to  
9 SMITH.

10 12. On or about October 26, 1993, SEISHINSHA assigned to  
11 SMITH all of its claims against defendants herein to recover  
12 unpaid amounts due to SEISHINSHA pursuant to the Appleaseed Author  
13 License.

14 13. In or about 1989, ECLIPSE made, executed, and  
15 delivered to Seishinsha, Ltd., ("SEISHINSHA") an Agreement for  
16 the exclusive rights to publish the Black Magic comic book series  
17 in the English language, and to otherwise adapt the Black Magic  
18 comic book series for purposes of marketing and selling same  
19 throughout the United States of America, Canada, and Great  
20 Britain (the "Black Magic Author License").

21 14. In or about 1989, ECLIPSE made, executed, and  
22 delivered to SMITH an Agreement for the Co-Publication of the  
23 Black Magic comic book series pursuant to which SMITH would  
24 translate from Japanese, script into English, and oversee the  
25 lettering of all stories and issues in the Black Magic comic book  
26 series (the "Black Magic Co-Publication Agreement").

27 15. On or about September 4, 1992, ECLIPSE entered into an  
28 Agreement pursuant to which it acknowledged the existence of the

1 Black Magic Author License and the Black Magic Co-Publication  
2 Agreement, and assigned certain rights under both contracts to  
3 SMITH.

4 16. On or about October 26, 1993, SEISHINSHA assigned to  
5 SMITH all of its claims against defendants herein to recover  
6 unpaid amounts due to SEISHINSHA pursuant to the Black Magic  
7 Author License.

8 17. On or about August 14, 1989, ECLIPSE made, executed,  
9 and delivered to Ushio Shuppansha Co., Ltd., ("SHUPPANSHA") an  
10 Agreement for the exclusive rights to publish the Cyber 7 comic  
11 book series in the English language, and to otherwise adapt the  
12 Cyber 7 comic book series for purposes of marketing and selling  
13 same throughout the United States of America, Canada, and Great  
14 Britain (the "Cyber 7 Author License").

15 18. On or about April 1, 1989, ECLIPSE made, executed, and  
16 delivered to SMITH an Agreement for the Co-Publication of the  
17 Cyber 7 comic book series pursuant to which SMITH would translate  
18 from Japanese, script into English, and oversee the lettering of  
19 all stories and issues in the Cyber 7 comic book series (the  
20 "Cyber 7 Co-Publication Agreement").

21 19. On or about September 4, 1992, ECLIPSE entered into an  
22 Agreement pursuant to which it acknowledged the existence of the  
23 Cyber 7 Author License and the Cyber 7 Co-Publication Agreement,  
24 and assigned certain rights under both contracts to SMITH.

25 20. On or about October 19, 1993, SHUPPANSHA assigned to  
26 SMITH all of its claims against defendants herein to recover  
27 unpaid amounts due to SHUPPANSHA pursuant to the Cyber 7 Author  
28 License.

1           21. On or about August 1, 1988, SMITH made, executed, and  
2 delivered to Studio Nue Co., Ltd., ("STUDIO NUE") an Agreement  
3 for the exclusive rights to publish multiple series of Dirty Pair  
4 comic books in the English language based on an original series  
5 of Japanese novels, and to market and sell same in the United  
6 States of America, Canada, and Great Britain (the "Dirty Pair  
7 Author License").

8           22. On or about August 1, 1988 and again on May 1, 1990,  
9 ECLIPSE made, executed, and delivered to SMITH Agreements for the  
10 Co-Publication of the Dirty Pair comic book series pursuant to  
11 which SMITH would furnish to ECLIPSE finished pages of comic book  
12 art and writing in all issues of the Dirty Pair comic book series  
13 (collectively the "Dirty Pair Co-Publication Agreement").

14           23. Pursuant to the May 1, 1990 Dirty Pair Co-Publication  
15 Agreement, ECLIPSE agreed to pay directly to STUDIO NUE the  
16 royalty owed by SMITH under the Dirty Pair Author License.  
17 ECLIPSE has paid some, but not all of, such royalty payments due  
18 to STUDIO NUE, and became a third party beneficiary of the Dirty  
19 Pair Author License.

20           24. On or about September 4, 1992, ECLIPSE entered into an  
21 Agreement pursuant to which it acknowledged the existence of the  
22 Dirty Pair Author License and the Dirty Pair Co-Publication  
23 Agreement, and assigned certain rights under both contracts to  
24 SMITH.

25           25. On or about October 12, 1993, STUDIO NUE assigned to  
26 SMITH all of its claims against defendants herein to recover  
27 unpaid amounts due to STUDIO NUE pursuant to the Dirty Pair  
28 Author License under which ECLIPSE became a third party

1 beneficiary.

2 26. On or about June 22, 1990, ECLIPSE made, executed, and  
3 delivered to Akihiro Yamada, ("YAMADA") an Agreement for the  
4 exclusive rights to publish the Lost Continent comic book series  
5 in the English language, and to otherwise adapt the Lost  
6 Continent comic book series for purposes of marketing and selling  
7 same throughout the United States of America, Canada, and Great  
8 Britain (the "Lost Continent Author License").

9 27. On or about June 22, 1990, ECLIPSE made, executed, and  
10 delivered to SMITH an Agreement for the Co-Publication of the  
11 Lost Continent comic book series pursuant to which SMITH would  
12 translate from Japanese, script into English, and oversee the  
13 lettering of each and every page of all stories and issues in the  
14 Lost Continent comic book series (the "Lost Continent Co-  
15 Publication Agreement").

16 28. On or about September 4, 1992, ECLIPSE entered into an  
17 Agreement pursuant to which it acknowledged the existence of the  
18 Lost Continent Author License and the Lost Continent Co-  
19 Publication Agreement, and assigned certain rights under both  
20 contracts to SMITH.

21 29. On or about October 16, 1993, YAMADA assigned to SMITH  
22 all of its claims against defendants herein to recover unpaid  
23 amounts due to YAMADA pursuant to the Lost Continent Author  
24 License.

25 30. Pursuant to the Appleseed Author License, ECLIPSE was  
26 to pay certain royalties to SEISHINSHA.

27 31. Pursuant to the Appleseed Co-Publication Agreement  
28 ECLIPSE was to pay certain fees to SMITH.

1           32. Pursuant to the Black Magic Author License, ECLIPSE  
2 was to pay certain royalties to SEISHINSHA.

3           33. Pursuant to the Black Magic Co-Publication Agreement  
4 ECLIPSE was to pay certain fees to SMITH.

5           34. Pursuant to the Cyber 7 Author License, ECLIPSE was to  
6 pay certain royalties to SHUPPANSHA.

7           35. Pursuant to the Cyber 7 Co-Publication Agreement  
8 ECLIPSE was to pay certain fees to SMITH.

9           36. Pursuant to the Dirty Pair Author License, ECLIPSE was  
10 to pay certain royalties to STUDIO NUE as a third party  
11 beneficiary thereof.

12           37. Pursuant to the Dirty Pair Co-Publication Agreement  
13 ECLIPSE was to pay certain fees to SMITH.

14           38. Pursuant to the Lost Continent Author License, ECLIPSE  
15 was to pay certain royalties to YAMADA.

16           39. Pursuant to the Lost Continent Co-Publication  
17 Agreement ECLIPSE was to pay certain fees to SMITH.

18           40. ECLIPSE has failed and refused to make all of the  
19 payments due to SEISHINSHA and SMITH pursuant to the Appleseed  
20 Author License and the Appleseed Co-Publication Agreement,  
21 respectively.

22           41. ECLIPSE has failed and refused to make all of the  
23 payments due to SEISHINSHA and SMITH pursuant to the Black Magic  
24 Author License and the Black Magic Co-Publication Agreement,  
25 respectively.

26           42. ECLIPSE has failed and refused to make all of the  
27 payments due to SHUPPANSHA and SMITH pursuant to the Cyber 7  
28 Author License and the Cyber 7 Co-Publication Agreement,



1 respectively.

2 43. ECLIPSE has failed and refused to make all of the  
3 payments due to STUDIO NUE and SMITH pursuant to the Dirty Pair  
4 Author License as a third party beneficiary thereof and the Dirty  
5 Pair Co-Publication Agreement, respectively.

6 44. ECLIPSE has failed and refused to make all of the  
7 payments due to YAMADA and SMITH pursuant to the Lost Continent  
8 Author License and the Lost Continent Co-Publication Agreement,  
9 respectively.

10 45. The Appleeed Author License, the Black Magic Author  
11 License, the Cyber 7 Author License, the Dirty Pair Author  
12 License, and the Last Continent Author License were each to be  
13 performed in the City and County of San Francisco.

14 46. The Appleeed Co-Publication Agreement, the Black  
15 Magic Co-Publication Agreement, the Cyber 7 Co-Publication  
16 Agreement, the Dirty Pair Co-Publication Agreement, and the Last  
17 Continent Co-Publication Agreement were each to be performed in  
18 the City and County of San Francisco, and the breaches of  
19 contract and torts committed under each such contract occurred in  
20 the City and County of San Francisco.

21 **FIRST CAUSE OF ACTION**

22 (Breach of the Appleeed Author License)

23 47. SMITH realleges and incorporates herein the allega-  
24 tions of Paragraphs 1 through 12, inclusive, 30, and 40.

25 48. Defendants have breached the Appleeed Author License  
26 in that they have failed or refused, and continue to fail or  
27 refuse, to make all of the payments due thereunder to SEISHINSHA.

28 49. SEISHINSHA has performed all conditions, covenants,

1 and promises to be performed on its part pursuant to the  
2 Appleseed Author License except those obligations SEISHINSHA was  
3 excused from performing.

4 50. As a proximate result of the breach of the Appleseed  
5 Author License by defendants, SMITH, as the assignee of  
6 SEISHINSHA under the Appleseed Author License, has thereby been  
7 damaged in an amount not less than Thirty Nine Thousand Six  
8 Hundred Seventy Three Dollars and 24/100 (\$39,673.24) with the  
9 exact amount to be determined according to proof.

10 51. The Appleseed Author License provides for the recovery  
11 of attorneys' fees and court costs in the event of legal action  
12 to enforce the provisions of that contract.

13 52. SMITH, individually and as the assignee of SEISHINSHA,  
14 has incurred attorneys' fees and court costs in connection with  
15 the bringing of this action in an amount to be determined  
16 according to proof.

17 **SECOND CAUSE OF ACTION**

18 (Breach of Appleseed Co-Publication Agreement)

19 53. SMITH, individually and as he is the assignee of  
20 SEISHINSHA, SHUPPANSHA, STUDIO NUE, and YAMADA realleges and  
21 incorporates herein the allegations of Paragraphs 1 through 12,  
22 inclusive, 31, and 40.

23 54. Defendants have breached the Appleseed Co-Publication  
24 Agreement in that they have failed or refused, and continue to  
25 fail or refuse, to make all of the payments due thereunder to  
26 SMITH.

27 55. SMITH has performed all conditions, covenants, and  
28 promises to be performed on his part pursuant to the Appleseed

1 Co-Publication Agreement except those obligations SMITH was  
2 excused from performing.

3 56. As a proximate result of the breach of the Appleseed  
4 Co-Publication Agreement by defendants, SMITH has thereby been  
5 damaged in an amount not less than Fifty Three Thousand Seven  
6 Hundred Five Dollars and 20/100 (\$53,705.20) with the exact  
7 amount to be determined according to proof.

8 **THIRD CAUSE OF ACTION**

9 (Breach of the Black Magic Author License)

10 57. SMITH realleges and incorporates herein the allega-  
11 tions of Paragraphs 1 through 8, inclusive, 13 through 16,  
12 inclusive, 32, and 41.

13 58. Defendants have breached the Black Magic Author  
14 License in that they have failed or refused, and continue to fail  
15 or refuse, to make all of the payments due thereunder to  
16 SEISHINSHA.

17 59. SEISHINSHA has performed all conditions, covenants,  
18 and promises to be performed on its part pursuant to the Black  
19 Magic Author License except those obligations SEISHINSHA was  
20 excused from performing.

21 60. As a proximate result of the breach of the Black Magic  
22 Author License by defendants, SMITH, as the assignee of  
23 SEISHINSHA under the Black Magic Author License, has thereby been  
24 damaged in an amount not less than Two Thousand Five Hundred  
25 Forty Seven Dollars and 84/100 (\$2,547.84) with the exact amount  
26 to be determined according to proof.

27 61. The Black Magic Author License provides for the  
28 recovery of attorneys' fees and court costs in the event of legal

1 action to enforce the provisions of that contract.

2 62. SMITH, individually and as the assignee of SEISHINSHA,  
3 has incurred attorneys' fees and court costs in connection with  
4 the bringing of this action in an amount to be determined  
5 according to proof.

6 **FOURTH CAUSE OF ACTION**

7 (Breach of the Black Magic Co-Publication Agreement)

8 63. SMITH realleges and incorporates herein the allega-  
9 tions of Paragraphs 1 through 8, inclusive, 13 through 16,  
10 inclusive, 33, and 41.

11 64. Defendants have breached the Black Magic Co-  
12 Publication Agreement in that they have failed or refused, and  
13 continue to fail or refuse, to make all of the payments due  
14 thereunder to SMITH.

15 65. SMITH has performed all conditions, covenants, and  
16 promises to be performed on his part pursuant to the Black Magic  
17 Co-Publication Agreement except those obligations SMITH was  
18 excused from performing.

19 66. As a proximate result of the breach of the Black Magic  
20 Co-Publication Agreement by defendants, SMITH has thereby been  
21 damaged in an amount not less than Five Thousand Nine Hundred  
22 Sixty Dollars and 78/100 (\$5,960.78) with the exact amount to be  
23 determined according to proof.

24 **FIFTH CAUSE OF ACTION**

25 (Breach of the Cyber 7 Author License)

26 67. SMITH realleges and incorporates herein the allega-  
27 tions of Paragraphs 1 through 8, inclusive, 17 through 20,  
28 inclusive, 34, and 42.

1 68. Defendants have breached the Cyber 7 Author License in  
2 that they have failed or refused, and continue to fail or refuse,  
3 to make all of the payments due thereunder to SHUPPANSHA.

4 69. SHUPPANSHA has performed all conditions, covenants,  
5 and promises to be performed on its part pursuant to the Cyber 7  
6 Author License except those obligations SHUPPANSHA was excused  
7 from performing.

8 70. As a proximate result of the breach of the Cyber 7  
9 Author License by defendants, SMITH, as the assignee of  
10 SHUPPANSHA under the Cyber 7 Author License, has thereby been  
11 damaged in an amount not less than Two Thousand Thirty Five  
12 Dollars and 99/100 (\$2,035.99) with the exact amount to be  
13 determined according to proof.

14 71. The Cyber 7 Author License provides for the recovery  
15 of attorneys' fees and court costs in the event of legal action  
16 to enforce the provisions of that contract.

17 72. SMITH, individually and as the assignee of SHUPPANSHA,  
18 has incurred attorneys' fees and court costs in connection with  
19 the bringing of this action in an amount to be determined  
20 according to proof.

21 **SIXTH CAUSE OF ACTION**

22 (Breach of the Cyber 7 Co-Publication Agreement)

23 73. SMITH realleges and incorporates herein the allega-  
24 tions of Paragraphs 1 through 8, inclusive, 17 through 20,  
25 inclusive, 35, and 42.

26 74. Defendants have breached the Cyber 7 Co-Publication  
27 Agreement in that they have failed or refused, and continue to  
28 fail or refuse, to make all of the payments due thereunder to

1 SMITH.

2 75. SMITH has performed all conditions, covenants, and  
3 promises to be performed on his part pursuant to the Cyber 7 Co-  
4 Publication Agreement except those obligations SMITH was excused  
5 from performing.

6 76. As a proximate result of the breach of the Cyber 7 Co-  
7 Publication Agreement by defendants, SMITH has thereby been  
8 damaged in an amount not less than Four Hundred Thirty Five  
9 Dollars and 68/100 (\$435.68) with the exact amount to be  
10 determined according to proof.

11 **SEVENTH CAUSE OF ACTION**

12 (Breach of the Dirty Pair Author License)

13 77. SMITH realleges and incorporates herein the allega-  
14 tions of Paragraphs 1 through 8, inclusive, 21 through 25,  
15 inclusive, 36, and 43.

16 78. Defendants have breached the Dirty Pair Author License  
17 in that they have failed or refused, and continue to fail or  
18 refuse, to make all of the payments due thereunder to STUDIO NUE.

19 79. STUDIO NUE has performed all conditions, covenants,  
20 and promises to be performed on its part pursuant to the Dirty  
21 Pair Author License except those obligations STUDIO NUE was  
22 excused from performing.

23 80. As a proximate result of the breach of the Dirty Pair  
24 Author License by defendants, SMITH, as the assignee of STUDIO  
25 NUE under the Dirty Pair Author License, is informed and  
26 believes, and thereon alleges, that STUDIO NUE has thereby been  
27 damaged in an amount not less than Four Thousand Twenty Dollars  
28 and 97/100 (\$4,020.97) with the exact amount to be determined

1 according to proof.

2 81. The Dirty Pair Author License provides for the  
3 recovery of attorneys' fees and court costs in the event of legal  
4 action to enforce the provisions of that contract.

5 82. SMITH, individually and as the assignee of STUDIO NUE,  
6 has incurred attorneys' fees and court costs in connection with  
7 the bringing of this action in an amount to be determined  
8 according to proof.

9 **EIGHTH CAUSE OF ACTION**

10 (Breach of the Dirty Pair Co-Publication Agreement)

11 83. SMITH realleges and incorporates herein the allega-  
12 tions of Paragraphs 1 through 8, inclusive, 21 through 25,  
13 inclusive, 37, and 43.

14 84. Defendants have breached the Dirty Pair Co-Publication  
15 Agreement in that they have failed or refused, and continue to  
16 fail or refuse, to make all of the payments due thereunder to  
17 SMITH.

18 85. SMITH has performed all conditions, covenants, and  
19 promises to be performed on his part pursuant to the Dirty Pair  
20 Co-Publication Agreement except those obligations SMITH was  
21 excused from performing.

22 86. As a proximate result of the breach of the Dirty Pair  
23 Co-Publication Agreement by defendants, SMITH has thereby been  
24 damaged in an amount not less than Twenty Nine Thousand Two  
25 Hundred Eighty One Dollars and 85/100 (\$29,281.85) with the exact  
26 amount to be determined according to proof.

1 NINTH CAUSE OF ACTION

2 (Breach of the Lost Continent Author License)

3 87. SMITH realleges and incorporates herein the  
4 allegations of Paragraphs 1 through 8 inclusive, 26 through 29,  
5 inclusive, 38, and 44.

6 88. Defendants have breached the Lost Continent Author  
7 License in that they have failed or refused, and continue to fail  
8 or refuse, to make all of the payments due thereunder to YAMADA.

9 89. YAMADA has performed all conditions, covenants, and  
10 promises to be performed on its part pursuant to the Lost  
11 Continent Author License except those obligations YAMADA was  
12 excused from performing.

13 90. As a proximate result of the breach of the Lost  
14 Continent Author License by defendants, SMITH, as the assignee of  
15 YAMADA under the Lost Continent Author License, has thereby been  
16 damaged in an amount not less than Twelve Thousand Two Hundred  
17 One Dollars and 77/100 (\$12,201.77) with the exact amount to be  
18 determined according to proof.

19 91. The Lost Continent Author License provides for the  
20 recovery of attorneys' fees and court costs in the event of legal  
21 action to enforce the provisions of that contract.

22 92. SMITH, individually and as the assignee of YAMADA, has  
23 incurred attorneys' fees and court costs in connection with the  
24 bringing of this action in an amount to be determined according  
25 to proof.

26 TENTH CAUSE OF ACTION

27 (Breach of the Lost Continent Co-Publication Agreement)

28 93. SMITH realleges and incorporates herein the allega-



1 tions of Paragraphs 1 through 8 inclusive, 26 through 29,  
2 inclusive, 38, and 44.

3 94. Defendants have breached the Lost Continent Co-  
4 Publication Agreement in that they have failed or refused, and  
5 continue to fail or refuse, to make all of the payments due  
6 thereunder to SMITH.

7 95. SMITH has performed all conditions, covenants, and  
8 promises to be performed on his part pursuant to the Lost  
9 Continent Co-Publication Agreement except those obligations SMITH  
10 was excused from performing.

11 96. As a proximate result of the breach of the Lost  
12 Continent Co-Publication Agreement by defendants, SMITH has  
13 thereby been damaged in an amount not less than Six Hundred  
14 Ninety Eight Dollars and 34/100 (\$698.34) with the exact amount  
15 to be determined according to proof.

16 **ELEVENTH CAUSE OF ACTION**

17 (Money Had and Received)

18 97. SMITH, individually and as the assignee of SEISHINSHA,  
19 SHUPPANSHA, STUDIO NUE, and YAMADA, realleges and incorporates  
20 herein the allegations of Paragraphs 1 through 96, inclusive.

21 98. Within the last four years, defendants became indebted  
22 to SMITH, individually and as the assignee of SEISHINSHA,  
23 SHUPPANSHA, STUDIO NUE, and YAMADA, in the sum of not less than  
24 One Hundred Fifty Thousand Five Hundred Sixty One Dollars and  
25 66/100 (\$150,561.66) with the exact amount to be determined  
26 according to proof (collectively the "Unpaid Amount").

27 99. Despite demand for payment thereof, no part of the  
28 Unpaid Amount has been remitted by defendants to SMITH,

1 individually and as the assignee of SEISHINSHA, SHUPPANSHA,  
2 STUDIO NUE, and YAMADA.

3 100. SMITH, individually and as the assignee of SEISHINSHA,  
4 SHUPPANSHA, STUDIO NUE, and YAMADA, is entitled to an amount not  
5 less than the Unpaid Amount with the exact amount to be  
6 determined according to proof plus interest thereon at the  
7 highest allowable legal rate from the date such amount became due  
8 and owing according to proof.

9 TWELFTH CAUSE OF ACTION

10 (Conversion)

11 101. SMITH, individually and as the assignee of SEISHINSHA,  
12 SHUPPANSHA, STUDIO NUE, and YAMADA realleges and incorporates  
13 herein the allegations of Paragraphs 1 through 100, inclusive.

14 102. Since in or about September 1992, SMITH, individually  
15 and as the assignee of SEISHINSHA, SHUPPANSHA, STUDIO NUE, and  
16 YAMADA, has demanded in writing from defendants full payment of  
17 the Unpaid Amount, but defendants have failed and refused, and  
18 continue to fail and refuse, to pay the full amount of the Unpaid  
19 Amount.

20 103. SMITH is informed and believes, and thereon alleges,  
21 that defendants have converted to their own use and benefit the  
22 Unpaid Amount.

23 104. As a proximate result of the conversion by defendants  
24 of the Unpaid Amount, SMITH, individually and as the assignee of  
25 SEISHINSHA, SHUPPANSHA, STUDIO NUE, and YAMADA has thereby been  
26 damaged in an amount not less than One Hundred Fifty Thousand  
27 Five Hundred Sixty One Dollars and 66/100 (\$150,561.66) with the  
28 exact amount to be determined according to proof.