IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FORUM ON OPEN ACCESS TO GOVERNMENT RECORDS INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	3:25-cv-02034-B
	§	
DALLAS COUNTY HISTORICAL FOUNDATION, d/b/a THE SIXTH FLOOR MUSEUM AT DEALEY PLAZA, AND NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,	§	
	§	
Defendants.	§	

DEFENDANT DALLAS COUNTY HISTORICAL FOUNDATION, d/b/a THE SIXTH FLOOR MUSEUM AT DEALEY PLAZA'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

I. The Museum's Revised License to NARA and Second Covenant Not to Sue are sufficient to meet the Museum's burden.

The Museum's Motion to Dismiss ("Motion") (Doc. 47) the First Amended Complaint ("FAC") (Doc. 37) should be granted because the Museum's October 2, 2026, Covenant Not to Sue ("First CNS") (Doc. 49, Ex. A) and the Museum's License to NARA ("Original License") (Doc. 49, Ex. B) meet the voluntary-cessation standard regardless of whether the issue is characterized as lack of standing based on the pleadings or mootness. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90–91 (2013) ("We have repeatedly held that an 'actual controversy' must exist not only 'at the time the complaint is filed,' but through 'all stages' of the litigation.") (citations omitted). As to the signature of the Museum not appearing on the Original License in the copy provided in the appendix to the Motion, this was a copying error. A better copy of the Original License showing the signature of the Museum is provided in an appendix. (App., Ex. 1).

Although Plaintiff Forum on Open Access to Government Records Inc. ("FGR") contends that the First CNS is "merely a repeat of [the Museum's] previous argument for disavowal," (Doc. 59, at 5) a covenant not to sue, unlike a disavowal, is "judicially enforceable." *See Already*, 568 U.S. at 92. The Supreme Court has treated exactly this kind of instrument as capable of ending a controversy. *See Already*, 568 U.S. at 93–94 (holding that an "unconditional and irrevocable" covenant not to sue mooted a challenge to the validity of the covenantor's mark).

The Museum invited FGR to provide proposed edits to the First CNS and the Original License to address any alleged deficiencies therein, but FGR provided none. Instead, on October 6, 2026, FGR submitted written questions to counsel for the Museum. (Doc. 60, at App. 65–66). The Museum requested FGR to agree to extend the briefing schedule on this Motion to allow time for the Museum to consider those written questions (App., Ex. 2), but counsel for FGR did not agree. The Museum has considered those questions and provides its answers (App., Ex. 3).

Moreover, the Museum has revised the License to NARA ("Revised License"). (App., Ex. 4). A comparison of the First License to the Revised License is attached. (App., Ex. 5).

Pursuant to the Museum's First CNS, the Museum has unconditionally and irrevocably promised not to sue FGR for copyright infringement claims arising under the Museum's copyrights in the Zapruder Film based on FGR's activities as of August 1, 2026, including its book and websites, including "any colorable imitations thereof." (Doc. 49, Ex. A). FGR, however, has repeated its strategy of making new allegations of alleged use and/or planned future use of the Museum's copyrights in the middle of briefing a motion to dismiss FGR's extant pleading. This process burdens the parties and the Court. Moreover, FGR's declaratory-judgment-based litigation conduct is admittedly based on a legally flawed motive, i.e., to not "leave the asserted copyright in place as to everyone else." ("Improper Litigation Goal") (Doc. 54, at 18). Thus, FGR's strategy of interjecting new alleged future plans and activities during briefing of a motion to dismiss does not seem to be a good faith effort to resolve any alleged actual controversy but rather to perpetuate litigation so as to pursue its Improper Litigation Goal, all at the expense of the Museum and judicial resources.

FGR's new allegations of alleged use and future plans to use the copyrights of the Museum were provided via a declaration in the Appendix to its Response to the Motion. (Doc. 60, App. 70–76, Declaration of Andrew Boehm signed October 26, 2026). Those allegations are not part of the FAC. Those new allegations of ongoing activities, recent activities and planned future activities are merely "colorable imitations" of the activities covered by the First CNS. Although FGR seems to imply that the First CNS did not cover "colorable imitations," (Doc. 59, at 11), the First CNS includes that language. (Doc. 49, at 7, line 6 "and any colorable imitations….").

Not content with only one instance of injecting new contentions (via the Boehm Declaration) during briefing of a motion to dismiss, counsel for FGR provided a second instance, this one in the form of a proposed amended complaint provided to the Museum on November 4, 2026, which seeks to add new contentions and a new defendant, but characterizing it as a mere "supplemental" complaint.

Nevertheless, the Museum has considered the Boehm Declaration, the proposed "supplemental" complaint, the long history of litigation multiplied by FGR and its counsel (including via two prior related entities and lawsuits), FGR's expressed Improper Litigation Goal, and desires to avoid the continuation of ongoing, unreasonable, and vexatious litigation, and provides a second Covenant Not to Sue ("Second CNS") (App., Ex. 6) which seeks to clearly cover all existing and any future possible activities of FGR and its counsel.

The Museum submits that the Second CNS and the Revised License are sufficient to meet the Museum's burden to demonstrate that this case is moot and that there is no actual case or controversy such that the Court lacks subject matter jurisdiction and the case should be dismissed with prejudice. Indeed, the First CNS and the Second CNS make it "absolutely clear" that enforcement against FGR, even though it never occurred, "could not reasonably be expected to recur." *Already*, 568 U.S. at 91 (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)).

The rule against considering new matters on reply does not prevent the Court from considering a development that bears on its own jurisdiction. *See* Fed. R. Civ. P. 12(h)(3) (a court must dismiss a case "at any time" it determines it lacks jurisdiction); *see also Exxon Mobil Corp. v. Arjuna Cap., LLC*, 735 F. Supp. 3d 709, 723 n.8 (N.D. Tex. 2024) (rejecting reply-brief objection because the court is "dutybound to ensure jurisdiction exists"). FGR argues that any amended or

additional instrument "would be presented for the first time on reply" and "should not be considered." (Doc. 59, at 6). But challenges to "[s]ubject-matter jurisdiction cannot be forfeited or waived and should be considered [by the Court] when fairly in doubt." *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009). Mootness turns on the facts as they exist when the Court rules, not on the facts at the time of the opening brief. *See Already*, 568 U.S. at 90–91 (an actual controversy "must be extant at all stages of review, not merely at the time the complaint is filed" (quoting *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 67 (1997))).

A. The Museum Has Carried Its Burden: The Second Covenant and Revised License Moot FGR's Claims Against the Museum Under Both Steps of the *Already* Test.

1. The Museum Survives Step One of the *Already* Test.

FGR offers several reasons the First CNS falls short of *Already*. None succeeds. FGR first argues that the controversy survives because the Covenant releases FGR's activities only "as of August 1, 2026" and does not reach its "existing and future potentially infringing activities," and because of this, it fails step two of the *Already* test. (Doc. 59, at 6–7). But *Already* does not require a covenant to reach every activity a plaintiff might someday undertake. It requires only that the covenant "encompass[] all of [the] allegedly unlawful conduct" at issue in the case. *Already*, 568 U.S. at 94. Once the Museum makes that showing, "it [is] incumbent on [FGR] to indicate that it engages in or has sufficiently concrete plans to engage in activities not covered by the covenant." *Id.* The FAC defines the conduct at issue in the Motion.

Even if the Court considers the Boehm Declaration and even if FGR files its new pleading, the Second CNS clearly covers everything, such that this lawsuit should be dismissed with prejudice.

FGR contends that "neither instrument" is "unconditional or irrevocable," pointing to the Original License's termination and modification clauses. (Doc. 59, at 7 (citing Doc. 49, Ex. B §§

11–13)). The covenants are unconditional and irrevocable, and they include a withdrawal of any objection of the Museum to any request of FGR to NARA, and run "through the life of the Museum's copyrights in the Zapruder Film and any extensions thereof." (Doc. 49, Ex. A; App., Ex. 6). *See Already*, 568 U.S. at 93 (covenant that was "unconditional and irrevocable" mooted the case). FGR's apparent concern that the Original License, now replaced by the Revised License, could in the future be terminated or modified is a hypothetical; regardless, the covenants independently cover this apparent concern.

FGR argues that the First CNS is unenforceable because it "binds [FGR] without requiring its assent or any performance on its part." (Doc. 59, at 8). Nike's covenant was also unilateral, and the Supreme Court still treated it as binding. *See Already*, 568 U.S. at 93–94, 98.

FGR argues that the Museum has not answered its questions about the instruments. (Doc. 59, at 9–10). Those questions have been answered. (*See* App., Ex. 3). The Second Covenant Not to Sue and the Revised License are intended to resolve any questions concerning whether this case should be dismissed with prejudice.

Relying on *Element Capital Management, LLC v. Element Finance, Inc.*, FGR argues that the Museum must show it lacks any intent to sue. No. 4:23-CV-310-Y, 2024 WL 2786055, at *4 (N.D. Tex. Mar. 12, 2024); (Doc. 59, at 8). That argument contradicts FGR's own allegation that the Museum has never filed a copyright action. *See supra* Part I.A. In *Element Capital*, by contrast, the trademark holder that granted the covenant was still suing the defendant on a Lanham Act claim in the same case, which alone created "a live controversy before the Court." 2024 WL 2786055, at *2–*3. Also, the covenant reached only claims under federal trademark law "arising out of [its] Federally Registered Mark," and it "still s[ought] to vindicate its common-law rights" in the same mark against the same party. *Id.* at *3–*4. The Museum, by contrast, has not asserted

a claim against FGR, in this case or any other. The Museum's statement that its copyright remains "valid and enforceable," (Doc. 49, Ex. A), does not show an intent to sue FGR. A rights holder that promises not to sue may still maintain that its right is valid, as Nike did by standing by its mark while promising not to enforce it against Already. *See Already*, 568 U.S. at 93–94.

2. The Museum Meets Step Two of the *Already* Test.

Although *Already* permits the party opposing mootness to rely on affidavits to show that it "engages in or has sufficiently concrete plans to engage in activities not covered by the covenant," *Already*, 568 U.S. at 89, 94–95, affidavits do not change the pleadings. In the Fifth Circuit, "mootness . . . is determined by reference to the allegations of the complaint." *Am. C.L. Union of Miss., Inc. v. Finch*, 638 F.2d 1336, 1345 (5th Cir. 1981). The Court may permit supplementation only if FGR seeks it within a reasonable time and "on just terms." Fed. R. Civ. P. 15(d); *see Finch*, 638 F.2d at 1347. If a plaintiff does not file a supplemental pleading "within a reasonable time, [its] claims for prospective relief must be dismissed as moot." *Finch*, 638 F.2d at 1347.

FGR has not sought to supplement "within a reasonable time," *id.*, or "on just terms," Fed. R. Civ. P. 15(d). *See also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013). In *Finch*, the court allowed supplementation because the plaintiffs could not have foreseen the change in administration that undercut their pleadings. 638 F.2d at 1346–47. Here, the intervening events are FGR's own. FGR released its new book *Frame-Up* three weeks after the Museum executed the First CNS, and days later it relied on the book to oppose dismissal. A party "cannot manufacture standing merely by inflicting harm on [itself]." *Clapper*, 568 U.S. at 416. Also, FGR cannot manufacture a new controversy each time the Museum resolves the old one. *See id.* Yet FGR's counsel has done just that for nearly three years. (*See* Doc. 48, at 9–11). This is counsel's seventh attempt (eighth if counting the recently proffered "supplemental" complaint), through a third corporate entity, to challenge the Museum's copyright. *See id.* at 9. The first suit, filed in February

2024 in the Northern District of California, was dismissed as to the Museum for lack of personal jurisdiction. *FOIACONSCIOUSNESS.COM LLC v. Nat'l Archives & Recs. Admin.*, No. 3:24-cv-00997-TSH (N.D. Cal. June 6, 2024); (Doc. 39). The second suit, filed in this Court in September 2024, was dismissed for lack of an actual controversy after the Museum granted the plaintiff a license to the one frame it had published, and the Court denied leave to file a second amended complaint. *F. on Open Access to Pub. Recs. Inc. v. Dall. Cnty. Hist. Found.*, No. 3:24-cv-2299-B (N.D. Tex.); (Docs. 29, 30, 39). FGR then filed this action in August 2025 and amended once after this Court identified the deficiencies in its pleading. (Doc. 1; Doc. 37). FGR's litigation has been vexatious. (*See* Doc. 48, at 9–11).

Allowing FGR to supplement now, more than two and a half years after the first suit was filed, would not be "on just terms"; it would merely reward FGR's litigation conduct and undue delay. *See Foman v. Davis*, 371 U.S. 178, 182 (1962).

FGR argues that its injury "runs through the National Archives" because NARA withholds the film based on the Museum's copyright. (Doc. 59, at 10–11). The First CNS, Second CNS, and the Revised License remove any alleged obstacle posed by the Museum. Any continued withholding is NARA's own decision, which FGR can challenge through its pending FOIA claim, which is pleaded against NARA alone, and which NARA has answered. (Doc. 37, at ¶¶ 201–09; Doc. 46).

FGR's remaining objection is that it wants commercial-grade copies to publish commercially. (Doc. 59, at 13–14). The Second CNS and the Revised License remove that objection.

II. FGR's Declaratory Judgment Actions Should Be Dismissed with Prejudice Under Rule 12(b)(6) for Failure to State a Claim.

A. Second Cause of Action

FGR fails to state a claim. FGR first alleges that "[t]he inaccuracy is the [Zapruder Film] registration's description of the work as unpublished." (*See* Doc. 59, at 16). No inaccuracy exists, however, because the Zapruder Film, as a complete audiovisual work, was not published when registration was sought. (*See* Doc. 48, at 21; Doc. 20, Ex. 3). Under the 1909 Copyright Act, "publication occurs when by consent of the copyright owner, the original or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public, or when an authorized offer is made to dispose of the work in any such manner . . . ." *Brown v. Tabb*, 714 F.2d 1088, 1091 (11th Cir. 1983) (quoting Melville B. Nimmer, 1 *Nimmer on Copyright*, § 4.04, at 19 (footnotes and emphasis omitted)).

At the time of the 1967 registration, the Zapruder Film, as a complete audiovisual work, had not been "published." FGR does not allege otherwise. Instead, it argues that certain frames of the Film appeared in a magazine article published in 1963 and that, therefore, the entire Film was inaccurately designated as "unpublished." (*See* Doc. 37, at ¶¶ 115–16). Inclusion of certain frames in a periodical publication does not constitute a publication of the Zapruder Film as a complete audiovisual work. *See Batjac Prods., Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223, 1230 (9th Cir. 1998) ("Publication of a portion of a work does not necessarily mean that the work as a whole has been published." (quoting Compendium I, Compendium of Copyright Office Practices § 3.1.1 IV(a) (1973))). For example, "[p]ublication of a detailed plot summary of a play does not constitute publication of the play as a whole." *Id.* (quoting Compendium I, § 3.1.1 IV(a)); (*see also* Doc. 48, at 21). In the same way, an alleged publication of discrete frames of the Zapruder Film does not constitute publication of the entire unpublished Film. *See Batjac Prods.*, 160 F.3d at 1230.

Therefore, the Zapruder Film was correctly designated as "unpublished" on the registration application.

Even if the unpublished designation in the registration is inaccurate, FGR still fails to allege that the application was filed "with knowledge that [the statement] was inaccurate." *See* 17 U.S.C. § 411(b)(1). FGR makes only two statements appearing to directly address the owner's alleged knowledge in the FAC and Response. (Doc. 59, at 16; Doc. 37, at ¶ 116). These statements fail to allege the required "scienter of intentional or purposeful concealment" needed to invalidate a copyright registration. *See Roberts v. Gordy*, 877 F.3d 1024, 1030 (11th Cir. 2017). There is no contention that the Zapruder Film, as a complete audiovisual work, was published at the time of registration in 1967.

B. Fourth Cause of Action

FGR's FAC and Response fail to rebut the presumption of validity afforded to the Zapruder Film, which encompasses the individual frames. *See* Copyright Act of 1909, Pub. L. No. 60-349, § 3, 35 Stat. 1075 (repealed 1976) ("[T]he copyright provided by this Act shall protect all copyrightable component parts of the work copyrighted."). Contrary to FGR's assertion, the Museum addresses each of the FAC's allegations. (*See, e.g.*, Doc. 48, at 19 ("[T]he recorded chain of title conveyed the Copyright in the Zapruder Film, *which as a matter of law encompasses the frames, leaving no separate copyright to acquire*." (emphasis added))). FGR's allegations regarding the Museum's "own October 2026 instrument" (Doc. 59, at 20) are immaterial because "[w]hen deciding a Rule 12(b)(6) motion to dismiss, the district court is limited to the allegations set forth in the complaint." *See Roebuck v. Dothan Sec., Inc.*, 515 F. App'x 275, 280 (5th Cir. Feb. 26, 2013) (citing *Kennedy v. Chase Manhattan Bank*, 369 F.3d 833, 839 (5th Cir. 2004)).

FGR's Response further claims, "a presumption that the film was unpublished is not an answer to a pleading that they are not." (Doc. 59, at 21). On this point, FGR misses the mark. The

presumption under § 410(c) is not just that the Zapruder Film was unpublished. The presumption is also that the copyright in the Zapruder Film, as a complete audiovisual work, is valid. This presumptively valid copyright includes the Film's frames under § 3 of the 1909 Copyright Act, and FGR has not rebutted this presumption of validity. Therefore, the properly executed and recorded assignment documents conveying the copyright in the entire Film establish the Museum's chain of title, including to the individual frames of the Film. (*See* Doc. 48, at 19).

C. Fifth Cause of Action

FGR's fifth cause of action relies on the same flawed premise regarding publication as the second cause of action. The Copyright Registration provides a presumption of validity as to the facts stated in the certificate. (*See* Doc. 59, at 21).

D. Sixth Cause of Action

FGR argues that the film is not a single copyrightable work because "there are different scenes on Zapruder's film, and the Museum has not established that the copyright applies to every single scene in Zapruder's film whether it was related to the assassination scene it claimed or not." (Doc. 59, at 23). FGR provides no legal support for this argument. The Zapruder Film enjoys a presumption of validity under § 410(c).

III. Conclusion

In view of the foregoing and the exhibits submitted herewith, the Museum respectfully requests that the Motion be granted and that this case be dismissed with prejudice.

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2026, I electronically filed the foregoing with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

/s/ Charles E. Phipps
Charles E. Phipps

CERTIFICATE OF A.I. USE

I hereby certify that a human attorney wrote this motion.

/s/ Charles E. Phipps
Charles E. Phipps