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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

1 TWENTIETH CENTURY FOX FILM CORPORATION,

2 Plaintiff,

3 v.

4 WARNER BROS. ENTERTAINMENT,
 5 INC.; WB STUDIO ENTERPRISES, INC.;
 6 WARNER BROS. PICTURES and DOES 1
 7 – 10,

8 Defendants.

Case No. CV 08-0889 GAF (AJWx)

[Honorable Gary A. Feess]

APPENDIX OF MISSTATEMENTS

**[Filed concurrently with Plaintiff
 Twentieth Century Fox Film
 Corporation's Opposition to
 Defendants' Motion to Dismiss]**

Date: May 5, 2008

Time: 9:30 a.m.

Courtroom: 740 – Roybal Building

Filing Date: February 8, 2008

Trial Date: TBD

Discovery Cut-off: TBD

Motion Cut-off: TBD

1 Plaintiff Twentieth Century Fox Film Corporation (“Fox”) submits the
 2 following appendix to list each of the statements in defendant Warner Bros.
 3 Entertainment Inc., WB Studio Enterprises Inc. and Warner Bros. Pictures’
 4 (collectively “WBP’s”) Motion to Dismiss (“Motion”), reviewed in Fox’s Opposition
 5 to the Motion, that either: (1) misstate the relevant agreements attached to Fox’s
 6 pleading; or (2) misstate the allegations of Fox’s Complaint; or (3) include purported
 7 information beyond the four corners of the Complaint.

NO.	MISSTATEMENT	ACCURATE STATEMENT
1. 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27	<p data-bbox="326 835 862 1016">“In 1991, Plaintiff Fox . . . quitclaimed away all of its rights in the underlying work” which “operated to completely divest Plaintiff of any rights [in the <i>Watchmen</i> project] under copyright law.”</p> <p data-bbox="326 1052 786 1087">(Motion at pp. 1: 9-10, 5:14, 6:1-2.)</p>	<p data-bbox="901 835 1468 1087">The grant of rights to LINV under the Quitclaim is “subject to the terms and conditions” of the Quitclaim. (Quitclaim at p. 2, ¶2.) The terms of the Quitclaim expressly grant to Fox copyright interests consisting of exclusive distribution rights in <i>Watchmen</i>. The Quitclaim provides:</p> <p data-bbox="901 1123 1468 1375">(a) “the Picture shall be produced by [LINV] and <i>shall be distributed</i> by Fox as a Subject Picture pursuant to the terms of the Largo Agreement for the time periods, territories and media set forth in the Largo Agreement” (Quitclaim at p. 4, ¶5, emphasis added.)</p> <p data-bbox="901 1411 1468 1591">(b) “[this Quitclaim] <i>grants to Fox distribution rights</i> for the first Motion Picture produced based on the Project.” (Short Form Quitclaim at p.1, ¶2, emphasis added.)</p> <p data-bbox="901 1627 1468 1808">(c) The referenced Largo Agreement likewise requires that <i>Watchmen</i> be distributed by Fox for the Distribution Term. (Largo Agreement at p. 15, ¶7; Amendment to Largo Agreement at p. 4, ¶5.)</p> <p data-bbox="901 1843 1256 1879">(See Compl. at p. 3: 11-16.)</p>

NO.	MISSTATEMENT	ACCURATE STATEMENT
2.	The 1991 Quitclaim was between “Plaintiff and Largo. . . .” (Motion at p. 2:15-16.)	The Quitclaim is an agreement between Fox and Largo International, N.V., a Netherlands Antilles corporation (“LINV”). (Quitclaim at p. 1; see also Compl. at p. 3: 11-16.)
3.	Fox’s distribution rights under the Largo Agreement “would only become effective or vest upon Plaintiff’s payment of a Production Advance.” (Motion at pp. 6:19-20, 11:24-28, 12:1-13).	(a) The Quitclaim provides that Fox’s rights “commence on the date hereof”, and that any conflict between the Quitclaim and Largo Agreement is controlled by the Quitclaim. (Quitclaim at pp. 4, ¶5(c), and 9, ¶15.) (b) The production advance language is, at best, a condition <i>subsequent</i> to Largo’s obligation to tender a budget. The Largo Agreement provides that Fox agrees to make a production advance “equal to 30% of the Budget for each Subject Picture, <i>as such Budget is set forth in statements provided by Largo to Fox and reasonably validated by Fox.</i> ” (No such Budget was ever tendered – WBP proceeded to principal photography and denies that Fox has any rights.) (Largo Agreement at pp. 13, ¶ 6(b)(i) (emphasis added), 12, ¶¶5, 6(a), and 16, ¶7.) (c) In the sentence immediately following the production advance language, the Largo Agreement provides that “ <i>notwithstanding anything to the contrary contained in the preceding sentence</i> ”, Fox “shall have the right to engage in all distribution activity customarily undertaken . . . prior to the release of a theatrical motion picture, including . . . creating trailers, television spots . . . and all other such customary pre-release distribution activity.” (Amendment to Largo Agreement at p. 5, ¶5 (emphasis added).)
4.	“Plaintiff’s own Complaint . . . fails to even attempt to allege the existence or satisfaction of any of the express conditions precedent contained in the prior agreements between Fox and Largo with respect to <i>Watchmen</i> .” (Motion at pp. 3:5-9, 7:12-18, 11:21-28, 12:15-19.)	Fox specifically alleges: “Fox has performed all terms and conditions necessary under the 1991 Quitclaim and Largo Amendment, as amended, to obtain all rights thereunder, except to the extent performance has been excused or prevented by Largo or its successors-in-interest.” (Compl. at p. 5:6-9.)

NO.	MISSTATEMENT	ACCURATE STATEMENT
5.	<p>Amendment 1 to the Largo Agreement “expressly recited that ‘Largo <i>shall own and control the exclusive copyright</i> on all Subject Pictures, including Future Subject Pictures.’”</p> <p>(Motion, p. 7:12-17.)</p>	<p>WBP ignores all language in Amendment 1 that unambiguously grants Fox exclusive distribution rights. Specifically:</p> <p>(a) The Amendment provides that “Largo hereby licenses to [Fox] . . . <i>all theatrical and non-theatrical distribution rights</i> in all Future Subject Pictures.” (Amendment to Largo Agreement at p. 4, ¶5.)</p> <p>(b) The Amendment contains further and extensive grants language that licenses to Fox distribution rights in a wide variety of mediums. (Amendment to Largo Agreement at p. 4, ¶5.)</p>
6.	<p>“[A]ccording to the Complaint itself, the 1994 Settlement Agreement superseded all agreements with Gordon, Golar and Largo and stood as the sole expression of their contractual duties.”</p> <p>(Motion at pp. 9:22-26, 10:22-24.)</p>	<p>There is no such statement in the Complaint. The Complaint instead alleges:</p> <p>Under the July 1994 Turnaround Agreement, Fox afforded Gordon the right to acquire Fox’s interests by payment of a Buy Out Price, but neither Gordon nor WBP paid the Buy Out. (Compl. at pp. 5:17-28; 6:1-2.)</p>
7.	<p>“In 1994, Plaintiff severed its entire relationship with the project’s producer, Lawrence Gordon . . . who by that point owned all of the rights to the project.”</p> <p>(Motion at p. 1:11-12.)</p>	<p>There is no allegation in the Complaint and no language in the Turnaround supporting any assertion that Fox “severed” its relationship with Gordon or that Gordon “owned all of the rights” in <i>Watchmen</i>. To the contrary:</p> <p>(a) The Turnaround states that Gordon was granted the right “<i>to acquire</i> all of the right, title and interest of Fox in the Project pursuant to the terms and conditions herein provided.” (Turnaround Agreement at p. 1, ¶¶ 1 and 2.)</p> <p>[continued to next page]</p>

NO.	MISSTATEMENT	ACCURATE STATEMENT
		<p>(b) Prior to the payment of the Buy Out Price, Fox had Changed Elements rights that included the right to reject any changes in the story line of <i>Watchmen</i> by Gordon or any studio with whom he sought to produce the work, and the right to control production and publication of uses based on Changed Elements, as provided under the Turnaround. (Turnaround Agreement, at p. 1-2, ¶2.)</p>
8.	<p>The 1994 Turnaround Notice “is not alleged to have been known to Defendants.”</p> <p>(Motion at p. 3:13-14.)</p>	<p>The Complaint alleges WBP had actual and/or constructive knowledge of the Turnaround. Fox alleges:</p> <p>(a) “WBP [was] . . . on inquiry notice as to Fox’s rights in <i>The Watchmen</i>” under the Turnaround; (Compl. at p.8:25-27) and</p> <p>(b) “Had WBP acted in good faith and made reasonably inquiry into Fox’s rights in <i>The Watchmen</i>, WBP would have discovered, <i>if it did not already know</i>, that Fox had . . . rights as described in the Turnaround Agreement . . .” (Compl. at p. 9:3-9.)</p>
9.	<p>The 1994 Turnaround Notice “nowhere refers to distribution rights, and does not grant to Plaintiff the sort of exclusive right that gives rise to a protectable copyright interest – in fact, it contains no rights – granting language at all.”</p> <p>(Motion at pp. 3:14-17, 13:1-2.)</p>	<p>(a) At the time of the Turnaround, Fox continued to own exclusive distribution rights in <i>Watchmen</i>. See Fox’s response to Misstatement No. 1.</p> <p>(b) The Turnaround Agreement expressly acknowledges Fox’s continued rights in <i>Watchmen</i>, requiring Gordon to pay a Buy Out Price “<i>to acquire</i> all of the right, title and interest of Fox in the Project pursuant to the terms and conditions herein provided.” (Turnaround Agreement at p. 1, ¶¶ 1 and 2, emphasis added.)</p> <p>[continued to next page]</p>

NO.	MISSTATEMENT	ACCURATE STATEMENT
		<p>(c) The Turnaround Agreement also reflects Fox’s exclusive copyright interests under the Changed Elements language. Prior to payment by Gordon of the Buy Out Price, Gordon was required to submit to Fox any “change in the storyline” and Fox was entitled to “reject such submission” (in which case Gordon could only proceed if he paid the Buy Out Price) or Fox could “proceed with the development and/or production” based on the Changed Elements, as provided under the Turnaround. (The right to control changes to a work and the right to control production and publication of the work based on such changes are copyright interests specifically protected by Section 106 of the Copyright Act.)</p> <p>(Turnaround Agreement, at p. 2, ¶4.)</p>
10.	<p>“[T]he Changed Elements provision does not grant to Plaintiff an exclusive copyright interest recognized under the Copyright Act” rather the provision is “an optional right of first refusal.”</p> <p>(Motion at pp. 12:26-28, 13:6-10.)</p>	<p>(a) The “right of first refusal” language in the Changed Elements clause does not reflect any “option” that Fox had to exercise in order to obtain rights. Rather, the first refusal language provides that Fox could exercise Changed Elements rights <i>each time Gordon made any changes to the work.</i> (Turnaround Agreement at p.2, ¶4, emphasis added.)</p> <p>[continued to next page]</p>

NO.	MISSTATEMENT	ACCURATE STATEMENT
		<p>(b) Prior to payment by Gordon of the Buy Out Price, Gordon was required to submit to Fox any “change in the storyline” and Fox was entitled to “reject such submission” (in which case Gordon could only proceed if he paid the Buy Out Price) or Fox could “proceed with the development and/or production” based on the Changed Elements, as provided under the Turnaround. (The right to control changes to a work and the right to control production and publication of the work based on such changes are copyright interests specifically protected by Section 106 of the Copyright Act.) (Turnaround Agreement, at p. 2, ¶ 4.)</p> <p>(c) Even if Fox had parted with its copyrights under the Turnaround Agreement (though the agreement is to the contrary), the Changed Elements rights would be protected under Section 106 as a beneficial ownership of a copyright interest, because they reflect Fox’s rights to supervise and control future uses in <i>Watchmen</i>.</p>
11.	<p>“Plaintiff expressly <i>admits</i> in the Complaint that Defendants did not have knowledge of Golar’s alleged obligations to Plaintiff under the 1991 Quitclaim. . . . The Complaint alleges that Defendants “incorrectly” believed that Plaintiff had quitclaimed all of its right, title, and interest to <i>Watchmen</i> under the 1991 Quitclaim.”</p> <p>(Motion, pp. 3:28, 4:1-4.)</p>	<p>There is no such admission in the Complaint. Fox alleges:</p> <p>(a) “WBP took purported title to <i>The Watchmen</i> . . . with <i>actual notice</i> of a . . . reservation to Fox in the 1991 Quitclaim of the same rights that WBP claims to have acquired.” Further, “[a]t the time [WBP] entered into the WBP Agreement, WBP had <i>actual knowledge</i> of the 1991 Quitclaim . . . WBP chose to be either <i>willfully ignorant</i> of . . . Fox’s interest . . . or <i>acted . . . without good faith in that regard</i>.” (Compl. at pp. 7:23-26; 8:6-12, 20-22, emphasis added.)</p> <p>[continued to next page]</p>

NO.	MISSTATEMENT	ACCURATE STATEMENT
		(b) The Complaint contains no allegation that WBP “believed” that plaintiff had quitclaimed all of its rights under the Quitclaim; the Complaint instead observes that WBP “incorrectly states” in the WBP Agreement that the Quitclaim conveys such rights. The Complaint alleges that WBP did so in bad faith. (Compl. at pp. 7:23-26; 8:6-12, 20-22.)
12.	<p>WBP states that Fox’s allegation that WBP had knowledge of the Quitclaim is “refuted by (1) by Plaintiff’s own specific allegations, which admit that Defendants were not aware that Golar owed the now claimed obligations under the 1991 Quitclaim”</p> <p>(Motion at pp. 4:2-8, 15:15-24.)</p>	<p>The Complaint contains no allegation or admission (“specific” or otherwise) that WBP was not aware that Golar/Gordon owed obligations under the Quitclaim. See response to Misstatement No. 11.</p>
13.	<p>“[L]ack of awareness of Plaintiff’s current construction of the 1991 Quitclaim appears on the fact of the very document that is alleged to be the act of interference: The WBP Agreement expressly recites the <i>absence</i> of the rights that plaintiff now claims.”</p> <p>(Motion at pp. 4:6-8, 17:18-21.)</p>	<p>WBP’s failure to acknowledge Fox’s rights under the Quitclaim in the WBP Agreement does not mean WBP was unaware of them. The Complaint alleges WBP had knowledge. See response to Misstatement No. 11 and 12.</p>
14.	<p>“Plaintiff alleges that Defendants have assumed the 1991 Quitclaim, and thus have become parties to it.”</p> <p>(Motion at p. 18:7-9)</p>	<p>There is no allegation in Fox’s Complaint that WBP has “assumed the 1991 Quitclaim” and “thus become parties to it.” Rather, Fox alleges that WBP has contracted to perform all obligations owed to Fox under the Quitclaim (Compl. at pp. 7:27-28, 8:1-5) and that the Quitclaim terms bind all successors and assigns. (Compl. at p. 4:4-7.)</p>

NO.	MISSTATEMENT	ACCURATE STATEMENT
15.	The 1994 Settlement Agreement “extinguished” the Quitclaim because the Quitclaim is an agreement between Fox and Largo, and Fox “admits” that Largo was a company “associated with Gordon.” (Motion at p. 9:22-26.)	(a) The 1994 Settlement Agreement is between Fox and LINV, not Fox and Largo. (Quitclaim, p. 1.) (b) Fox does not admit that Gordon was associated with Largo; Fox instead alleges that Gordon “withdrew” from Largo in November 1993, several months before the 1994 Settlement Agreement. (Compl. at p. 5:14-16.)
16.	“After more than a decade of inaction, Plaintiff has suddenly emerged to claim the sole right to distribute and exhibit the picture worldwide” (Motion at p. 1:21-22.)	Fox alleges that it acted promptly when it learned that WBP was purporting to produce <i>Watchmen</i> and was intending to commence principal photography. Fox specifically alleges that “[u]pon learning of WBP’s actions, Fox took <i>prompt steps</i> to notify WBP that its actions violated Fox’s rights under the 1991 Quitclaim and the Turnaround.” (Compl. at p. 9:15-22.)
17.	“In the ensuing years, the project was presented to numerous Hollywood studios, large and small, was in active development at two major studios, and was even ‘greenlit’ for production, with Plaintiff’s full knowledge, at a third major studio.” (Motion at p. 1:13-16.)	No such purported facts appear anywhere in the four corners of the Complaint. Instead: Fox alleges that it learned in July 2007 that WBP was proceeding to principal photography and denying Fox’s rights, and Fox acted immediately to demand that WBP cease and desist. (Compl. at p. 9:15-27.)
18.	“Largo dissolved” when Gordon withdrew. (Motion at p. 7:20-27.)	No such purported facts appear anywhere in the four corners of the Complaint.

DATED: April 21, 2008

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