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14 TWENTIETH CENTURY FOX FILM CORPORATION

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

13 TWENTIETH CENTURY FOX FILM CORPORATION,

14 Plaintiff,

15 v.

16 WARNER BROS. ENTERTAINMENT, INC.; WB STUDIO ENTERPRISES, INC.;
17 WARNER BROS. PICTURES and DOES 1
18 - 10,

19 Defendants.

Case No. CV 08-0889 GAF (AJWx)

[Honorable Gary A. Feess]

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO WARNER BROS.' MOTION *IN LIMINE* TO PRECLUDE REFERENCES TO WARNER BROS.' DISPUTES, SETTLEMENT NEGOTIATIONS, AND SETTLEMENTS WITH PARAMOUNT AND UNIVERSAL (WARNER BROS. MOTION *IN LIMINE* NO. 4)

Date: January 7, 2009

Time: 3:30 p.m.

Courtroom: 740 – Roybal Building

Filing Date: February 8, 2008

Trial Date: January 20, 2009

INTRODUCTION

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2 In its Motion *In Limine* to Preclude Reference to Warner Bros.’ Disputes,
3 Settlement Negotiations, and Settlements with Paramount and Universal (Motion *in*
4 *Limine* No. 4) (Dkt. 193, 193-2), Warner Bros. tries to eliminate highly relevant and
5 illuminating evidence supporting Fox’s claims for copyright infringement and
6 interference with contract. The evidence Warner Bros. seeks to exclude are
7 manifestly not “settlement” communications nor do they constitute impermissible
8 “character evidence.” Rather, they represent direct evidence, created during
9 contemporaneous adversarial exchanges with Paramount and other third-parties that
10 took place shortly before and during the same period Warner Bros. was plotting to
11 frustrate Fox’s rights, which confirm Warner Bros.’ actual knowledge that it had
12 failed to perform an adequate chain of title when it decided, nonetheless, to proceed
13 with infringing Fox’s copyright interests and interfere with Fox’s contracts.

14 Warner Bros. understandably works hard to keep from the jury, clear
15 evidence of Warner Bros.’ improper motive, intent and maneuverings to deny Fox’s
16 rights despite knowing the many infirmities of its badly constructed “chain of title.”
17 Rule 408 of the Federal Rules of Evidence, however, offers no shelter from the
18 admissibility of such important evidence. Moreover, even if the evidence were
19 “protected” by Rule 408 (which it is not), the evidence is not being used for any
20 purpose prohibited under the Rule. Similarly, the evidence is not excludable under
21 Rule 404 or 403 because it is not “character evidence” being used to show “action in
22 conformity,” but is rather being offered to prove Warner Bros.’ wrongful conduct in
23 this very matter. Nor is there any grounds to Warner Bros.’ assertion that the
24 evidence may be barred on the grounds of being prejudicial, confusing, or misleading.

25 The evidence which is the subject of Warner Bros.’ pending motion
26 represent highly relevant and informative adversarial exchanges between Warner
27 Bros. and Paramount from March to September 2007 that include admissions by
28 Warner Bros. that Fox’s claim of rights under the Turnaround Agreement was

1 “reasonable” and Paramount’s contention that it shared no blame for Warner Bros.’
2 faulty chain of title -- which simply regurgitated an earlier “chain of title” performed
3 by Paramount “without warranty.” The evidence in question reveals Warner Bros.’
4 motive and intent in exercising the May 2006 option in July 2007, despite receiving
5 documentation supporting Fox’s assertion of rights and learning of its own “chain of
6 title” errors. Against this same background, Warner Bros. chief IP counsel, Jeremy
7 Williams, has testified that Warner Bros. nonetheless proceeded to exercise its
8 purported option to acquire *Watchmen* rights in July 2007 as part of a “legal strategy”
9 (rather than any good faith attempt to consider the merits of Fox’s claims), and now
10 Warner Bros. seeks to exclude all of the evidence which shows the nature, operation
11 and purpose of that strategy to deny Fox its rights, and the malicious and willfully
12 oppressive manner in which that strategy was carried out.

13 As a further example confirming the relevance of this evidence Warner
14 Bros.’ failure to conduct an adequate review of the chain of title for *Watchmen*,
15 Paramount identified during its dispute with Warner Brothers, the means by which
16 Warner Bros. failed to conduct adequate rights clearance, and Warner Bros., in turn,
17 accused Paramount of failures to adequately secure rights in *Watchmen*. One of the
18 issues being discussed was Gordon’s submission of the *Watchmen* project to
19 Universal in late 2006 pursuant to an undisclosed turnaround agreement between
20 Gordon and Universal, and Gordon’s undisclosed submission of the *Watchmen* project
21 to Paramount pursuant to a turnaround agreement between Gordon and Paramount.
22 The evidence Warner Bros. would keep from the jury demonstrates that Warner Bros.
23 was aware, *before* it embarked on its “legal strategy” to deny Fox’s rights under the
24 Turnaround Agreement, of *three* prior turnaround agreements that are not accounted
25 for in Warner Bros.’ chain of title.

26 While Warner Bros. now wants to argue that it acted in good faith when
27 it exercised the July 2007 option, the evidence Warner Bros. seeks to exclude includes
28 Warner Bros.’ knowledge that Gordon had made serious errors in the chain of title

1 that included failure to identify three prior turnaround agreements, including the 1994
2 Turnaround Agreement with Fox, accusations that Paramount, Larry Gordon and
3 others were responsible for a failed rights clearance underlying the May 2006 Option
4 Agreement, and accusations by Paramount that Warner Bros. was responsible for the
5 claims being made by Fox. In one of these exchanges, Warner Bros. refers to Fox's
6 claims *in this action* as "reasonable" and "seriously asserted," admissions which belie
7 the story Warner Bros. now wants to paint that it acted innocently and unaware of
8 Fox's rights. These contemporaneous exchanges of Warner Bros.' position illuminate
9 admissions about Warner Bros.' intent and motive to deny Fox's rights, and reveal
10 Warner Bros.' attempt to hold others responsible for the harms suffered by Fox as a
11 result of Warner Bros.' decision to deny Fox its rights.

12 ARGUMENT

13 **I. The Evidence at Issue Is Not Covered Under Fed. R. Evid. 408.**

14 The disputes between and among Warner Bros., Universal, and
15 Paramount over *Watchmen* rights immediately before, during and after Fox's assertion
16 of rights in July 2007 are directly relevant to the issues in this case. At issue is
17 whether Warner Bros. conducted an inadequate chain-of-title investigation with
18 respect to *Watchmen* and whether Warner Bros. deliberately interfered with Fox's
19 contract rights under the Turnaround Agreement. If it failed to conduct adequate
20 rights clearance, it cannot claim to be a bona fide purchaser of any rights, and its
21 contemporaneous knowledge that the May 2006 Option is flawed sheds light on
22 Warner Bros.' wrongful intent to deny Fox's rights under the Turnaround Agreement.
23 Disputes between and among Warner Bros., Universal, and Paramount are plainly
24 relevant to show Warner Bros.' acknowledgement of such inadequacies and its motive
25 and intent when it exercised the May 2006 Option and took other acts in July 2007
26 and thereafter that frustrated Fox's rights.

27 The critical failing in Warner Bros.' argument is its insistence that the
28 evidence at issue is inadmissible under Fed. R. Evid. 408 because it concerns "conduct

1 or statements made in compromise negotiations regarding the claim.” Fed. R. Evid.
2 408. Warner Bros.’ apparently maintains that because it later (purportedly in
3 November 2007) resolved disputes with Paramount, Universal, and Gordon over
4 rights clearance, it can thereby shield all evidence of the adversarial exchanges
5 leading to that settlement that reveal the failed rights clearance that gave rise to the
6 disputes in the first place. No authority supports such an argument. Whether or not
7 some sort of settlement has now been reached between the parties (a proposition for
8 which no evidence has been presented), this cannot prevent discovery of the
9 antagonistic exchanges between Warner Bros., Paramount, Universal, and Gordon
10 where they assigned responsibility for (and identified facts giving rise to) claims of
11 failed rights clearance. Indeed, Warner Bros. has, *since the time Fox filed this lawsuit*,
12 asserted claims against Gordon claiming that he is responsible for the failed rights
13 clearance that has resulted in Fox’s damages. Any statements made by Warner Bros.
14 about who is responsible for the failed rights clearance, and the circumstances under
15 which Warner Bros. purported to acquire rights from parties that never had them, is
16 obviously directly relevant to Fox’s claims and undermines any notion that Warner
17 Bros. is a bona fide purchaser of any rights – and is most certainly not an “offer to
18 compromise” under Fed. R. Evid. 408.

19 Moreover, Warner Bros. completely misreads Fed. R. Evid. 408’s
20 prohibition on the admission of settlement negotiations to prove liability. Rule 408
21 specifically provides that “[e]vidence of the following is not admissible on behalf of
22 any party, *when offered to prove liability for . . . a claim*[:] “conduct or statements
23 made in compromise negotiations *regarding the claim*.” Fed. R. Evid. 408 (emphasis
24 added). Fox’s principal claims in this matter are that Warner Bros.’ production and
25 distribution of *Watchmen* constitute copyright infringement and that Warner Bros. has
26 intentionally interfered with Fox’s contracts. Nothing in Rule 408 prevents the use
27 of statements made in Warner Bros. disputes with other parties that shed light on
28 Warner Bros.’ liability to Fox on the claims in this action. Indeed, the Rule expressly

1 states that only statements of liability concerning “*the* claim” – not claims between the
2 defendant and third-parties – are prohibited. As the 10th Circuit has held,

3 Rule 408 is limited in its application to evidence concerning the
4 settlement or compromise of “a claim” when such evidence is offered
5 to prove liability or validity of ‘*the* claim’ or its amount. Read
6 literally, the rule does not appear to cover compromises and
7 compromise offers that do not involve the dispute that is the subject of
8 the suit, even if one of the parties to the suit was also a party to the
9 compromise.

10 *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356, 1363 (10th Cir. 1987) (emphasis
11 in original) (holding that such evidence should be excluded under Rule 408 only when
12 it arises out of the same transaction as that being litigated and is similar to the claim
13 being sued upon).

14 None of the evidence in question are communications between Fox and
15 Warner Bros. respecting the claim or any offers of compromise between the parties
16 respecting the claims. Rather, Warner Bros. would like to have its proverbial cake
17 and eat it too, by asserting a bona fide purchaser defense and claiming it acted in good
18 faith when it disrupted Fox’s contracts while keeping out any evidence that it took its
19 rights in *Watchmen* with full notice of Fox’s rights as a willful infringer and as part of
20 a “legal strategy” to deny Fox its rights. The Court should deny Warner Bros.’
21 Motion *in Limine* No. 4.

22 **II. The Evidence Is Also Admissible at Trial for Any Other Purpose.**

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24 Rule 408 provides that it “does not require exclusion if the evidence is
25 offered for purposes not prohibited by [the Rule].” Fed. R. Evid. 408. Thus, even
26 assuming the evidence Warner Bros. seeks to exclude is even protected by Fed. R.
27 Evid. 408 (which it is not), the Ninth Circuit has repeatedly held – citing the plain
28 language of the Rule – that the scope of protection under Rule 408 for admissibility at

1 trial is exceedingly limited; such evidence may be used for *any* purpose *other* than
2 what is expressly prohibited by the rule. Fed. R. Evid. 408 (“This rule does not
3 require exclusion if the evidence is offered for purposes not prohibited by subdivision
4 (a);” *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1161 (9th Cir. 2007) (“Rule 408 . .
5 . . does *not* bar such evidence [of settlement negotiations] when ‘offered for [other]
6 purposes’ The ‘other purpose’ need not be specifically mentioned [in Rule
7 408]”); *U.S. v. Technic Servs., Inc.*, 314 F.3d 1031, 1045 (9th Cir. 2002) (holding that
8 evidence from settlement negotiations was admissible to prove obstruction of an EPA
9 investigation).

10 Under this rule, it is clear that Fox is entitled to use the evidence at issue
11 at trial to show, for example, when Warner Bros. first became aware of Fox’s rights in
12 *Watchmen*, whether Warner Bros. acted reasonably, whether Warner Bros. acted
13 willfully, the information available to Warner Bros. when it purported to acquire
14 rights, whether Warner Bros. acted in good faith, whether Warner Bros. was on
15 inquiry or constructive notice of Fox’s rights, whether Warner Bros. had reason to
16 question if Gordon or Paramount had rights in *Watchmen*, and other matters relevant
17 to the question whether Warner Bros. could have been a bona fide purchaser of
18 *Watchmen* rights or acted to intentionally interfere with Fox’s contracts. None of
19 these uses of the evidence are prohibited under Rule 408.

20 **III. The Evidence At Issue Should Not Be Excluded Under Rule 404(b) Nor**
21 **Rule 403.**

22 Warner Bros. also argues that evidence of its disputes and settlements
23 with Paramount and Universal is inadmissible as improper character evidence that Fox
24 will use to “show action in conformity therewith.” (Warner Bros.’ Motion *in Limine*,
25 Dkt. 293-2, at p. 4) (citing Fed. R. Evid. 404(b)). Warner Bros. misstates the rule.
26 Fox is not offering the evidence to show that Warner Bros. frequently does a faulty
27 rights clearance of its films and thus was likely to have done so here. It seeks to
28 demonstrate, by contrast, that Warner Bros. conducted a flawed and incomplete

1 clearance of *Watchmen*, ***the actual film property at issue in this case***, and that its
2 motive and intent was to disrupt Fox's rights under the Turnaround Agreement. Far
3 from being improper character evidence, Warner Bros.' acts and omissions as they
4 regard *Watchmen* are a paramount and critical evidentiary issue in this case.

5 Similarly, the Court should not preclude the evidence based on Rule 403
6 grounds. In fact, Warner Bros. own arguments demonstrate that the evidence at issue
7 is highly relevant. The fact that it is "bad" for Warner Bros.' case does not make it
8 subject to Rule 403 or any other grounds for exclusion. There is no risk of any "trial
9 within a trial" because the evidence in question goes directly to Warner Bros. flawed
10 rights clearance in regards to *Watchmen* and the reasons Warner Bros. exercised the
11 May 2006 Option in July 2007. That evidence must be allowed to see the light of day.
12 Warner Bros. is free to rebut or attempt explain the evidence (as it did, without
13 success, in depositions in this case), but Warner Bros.' desire to "explain away" its
14 misconduct is no reason to exclude the evidence, but rather the opposite.
15 Accordingly, the Court should deny Warner Bros.' Motion *in Limine* No. 4.

16 CONCLUSION

17 The evidence Warner Bros. seeks to exclude from trial is exactly the
18 evidence the jury should be permitted to see. Nothing Warner Bros. references in its
19 Motion *in Limine* No. 4 falls under the protection of Rule 408. Nor does the evidence
20 at issue constitute character evidence under Rule 404. Finally, the prejudicial effect of
21 such evidence – if any – does not come close to substantially outweighing its
22 probative value under Rule 403. The Court should deny Warner Bros.' attempts to

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1 exclude the highly relevant evidence concerning its misconduct in connection with
2 denying Fox its rights in *Watchmen*.

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4 DATED: December 29, 2008

5 LOUIS A. KARASIK
6 SAMUEL C. TAYLOR
7 CASONDRA K. RUGA
8 **ALSTON & BIRD LLP**

9 /s/ Louis A. Karasik

10 Louis A. Karasik
11 Attorneys for Plaintiff
12 TWENTIETH CENTURY FOX FILM
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1 **CERTIFICATE OF SERVICE**

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3 I hereby certify that on December 29, 2008, I caused a copy of **PLAINTIFF'S**
4 **MEMORANDUM IN OPPOSITION TO WARNER BROS.' MOTION IN**
5 **LIMINE TO PRECLUDE REFERENCES TO WARNER BROS.' DISPUTES,**
6 **SETTLEMENT NEGOTIATIONS, AND SETTLEMENTS WITH**
7 **PARAMOUNT AND UNIVERSAL (WARNER BROS. MOTION IN LIMINE**
8 **NO. 4)** to be served upon the following counsel in the manner described below:

9 Via the Court's CM/ECF system:

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29 /s/ Louis A. Karasik
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