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12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA
14

15 TWENTIETH CENTURY FOX FILM)
CORPORATION,)

16 Plaintiff,)

17 vs.)

18 WARNER BROS.)
19 ENTERTAINMENT, INC.; WB)
STUDIO ENTERPRISES, INC.;)
20 WARNER BROS. PICTURES,)

21 Defendants.)
22)
23)
24)
25)

Case No. CV 08-0889 GAF (AJWx)

**DEFENDANTS' NOTICE OF
MOTION AND MOTION IN
LIMINE TO PRECLUDE
REFERENCE TO EVIDENCE OF
GOLAR'S AND LEI'S DUTY TO
INDEMNIFY WARNER BROS.
(MOTION IN LIMINE NO. 5)**

Filed Concurrently Herewith:
1. Memorandum of Points and
Authorities in Support Thereof
2. [Proposed] Order

Judge: Hon. Gary A. Feess
Date: January 5, 2009
Time: 9:30 AM
Courtroom: 740
Complaint Filed: February 8, 2008
Trial Date: January 20, 2009

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NOTICE OF MOTION AND MOTION

TO PLAINTIFF AND ITS COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on January 5, 2009, at 9:30 AM or as soon thereafter as counsel may be heard before the Honorable Gary A. Fees in the above-entitled Court, Defendants Warner Bros. Entertainment, Inc. et al. ("Warner Bros.") will, and hereby do, move *in limine* for an order precluding plaintiff Twentieth Century Fox Film Corporation ("Fox") and any of its attorneys, witnesses, and expert witnesses, when before the jury or jury panel, from offering or referring to evidence or argument regarding, or interrogating any witness regarding, Golar, Inc.'s ("Golar") and LEI Development Projects, Inc.'s ("LEI") duty to indemnify Warner Bros. in connection with this action.

This Motion is made on the ground that evidence of these parties' duty to indemnify Warner Bros.' is inadmissible under Federal Rules of Evidence 411 and 403. Under Rule 411, evidence of their duty to indemnify Warner Bros. is inadmissible for the purpose of proving whether Warner Bros. has acted wrongfully. Nor may Fox introduce this evidence to prove bias or prejudice on the part of Golar and LEI. Under Rule 403, where certain evidence is found to have the same probative value but a lower danger of unfair prejudice, a court may discount the value of the item first offered and exclude it if its discounted probative value is substantially outweighed by unfairly prejudicial risk. Here, both Golar and LEI have compensation contingent on *Watchmen's* distribution. Unlike the parties' duty to indemnify, which, if introduced, will unfairly prejudice Warner Bros., evidence of Golar's and LEI's contingent compensation is probative of bias and less prejudicial.

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1 This Motion is based upon this Notice and Motion, the attached
2 Memorandum of Points and Authorities, matters of which the Court may take
3 judicial notice, and any other matters as Warner Bros. may present prior to the
4 Court's ruling on the Motion. The Motion is made following the conference of
5 counsel pursuant to Local Rule 7-3, which occurred on December 8, 2008.

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7 Dated: December 17, 2008

GLASER, WEIL, FINK, JACOBS &
SHAPIRO, LLP

IRELL & MANELLA LLP

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By: Laura Seigle
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12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA
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15 TWENTIETH CENTURY FOX FILM)
CORPORATION,)

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19 ENTERTAINMENT, INC.; WB)
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20 WARNER BROS. PICTURES,)

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Case No. CV 08-0889 GAF (AJWx)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION IN
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Judge: Hon. Gary A. Feess
Date: January 5, 2009
Time: 9:30 AM
Courtroom: 740
Complaint Filed: February 8, 2008
Trial Date: January 20, 2009

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Fox intends to introduce evidence concerning Golar, Inc.'s ("Golar")¹ and LEI
4 Development Projects, Inc.'s ("LEI") duty to indemnify Warner Bros. in connection
5 with this litigation. Fox will use the evidence to try to convince the jury that Golar's
6 and LEI's indemnification obligations, and Warner Bros.' placing them on notice
7 thereof, are probative of the strength of Fox's claims.

8 Fox is barred from introducing such evidence for two reasons. First, evidence
9 of indemnity is inadmissible to prove whether Fox's claims have any merit. Fed. R.
10 Evid. 411. Second, even though Rule 411 has an exception if indemnification
11 evidence is offered as proof of bias or prejudice, the indemnification evidence
12 should be excluded under Rule 403 because it is more prejudicial than probative and
13 because alternative, less prejudicial, evidence of Golar's and LEI's supposed bias
14 exists.

15 **II. BACKGROUND**

16 In May 2006, Warner Bros. entered into a contract with Golar and LEI
17 whereby those parties quitclaimed their rights in *Watchmen* to Warner Bros. Golar
18 and LEI also represented and warranted that there were no contracts or agreements,
19 other than those specifically listed in the agreement, "in connection with the
20 Property [*Watchmen*] and such documents have not been amended or cancelled and
21 are in full force and effect as originally drafted." The May 2006 Agreement did not
22 reference the very agreements on which Fox bases its claims against Warner Bros. –
23 the Amendment No. 1, the Settlement Agreement and the Turnaround Agreement.
24 In the May 2006 Agreement, Golar and LEI also agreed to indemnify Warner Bros.
25 "against any and all claims, demands, liability or expense . . . arising out of or
26 resulting from any breach of" their representations. Lastly, the May 2006

27 _____
28 ¹ Larry Gordon is the sole owner of Golar.

1 Agreement entitled LEI to a defined percentage of proceeds derived from the
2 *Watchmen* motion picture produced by Warner Bros. By a separate producer
3 agreement with Warner Bros., Larry Gordon is entitled to a defined percentage of
4 *Watchmen* proceeds, subject to certain conditions.

5 When, in January 2008, Fox brought suit against Warner Bros. based on
6 alleged rights in *Watchmen* conferred on Fox through agreements not referenced in
7 the May 2006 Agreement, Warner Bros. put both Golar and LEI on notice of their
8 indemnification obligations. Both Golar and LEI dispute their duty to indemnify
9 Warner Bros. against Fox's claims.

10 **III. ARGUMENT**

11 **A. Evidence Of Warner Bros.' Indemnity Arrangements Is Inadmissible** 12 **Under Rule 411**

13 Fox plans to use evidence of Golar's and LEI's duty to indemnify and Warner
14 Bros.' notifications to and communications with them about their indemnification
15 obligation as evidence that the disputed agreements are material to *Watchmen's*
16 chain-of-title and that Fox's allegations of wrongful conduct have merit. This use of
17 indemnification evidence is exactly what Rule 411 prohibits.

18 Under Rule 411, evidence of indemnification against claims or liability is
19 inadmissible to prove wrongful conduct on the part of the indemnified party. *See*
20 Fed. R. Evid. 411; *Matosantos Commercial Corp. v. SCA Tissue North America,*
21 *LLC*, 369 F. Supp. 2d 191, 195 (D.P.R. 2005) ("the rationale behind Fed. R. Evid.
22 411 will be best served by suppressing at trial evidence of the indemnity agreement
23 between [the defendant and a third-party]"); *Griffin v. Hilke*, 804 F.2d 1052, 1057
24 (8th Cir. 1986) ("The general rule . . . is that interjection of the fact that the
25 defendant is protected by insurance or other indemnity may be prejudicial error
26 requiring reversal").

27
28

1 Fox may not use evidence of Golar's and LEI's duty to indemnify Warner
2 Bros. or the indemnification communications to suggest that Fox's claims have any
3 merit.

4 **B. Evidence Of Warner Bros.' Indemnity Arrangements Is Inadmissible**
5 **Under Rule 403**

6 To evade Rule 411's exclusion of evidence of indemnification, Fox argues
7 that it will offer the indemnification evidence to prove Golar's and LEI's bias or
8 prejudice. However, even if offered for that purpose, the indemnification evidence
9 should still be excluded because it is more prejudicial than probative, and because
10 alternative, less prejudicial, evidence of Golar's and LEI's supposed bias exists.

11 Rule 403 allows the exclusion of evidence if its probative value is
12 substantially outweighed by the "danger of unfair prejudice," "misleading the jury,"
13 or "needless presentation of cumulative evidence." In balancing probative value and
14 unfair prejudice, Rule 403 takes account of evidentiary alternatives. Thus, "what
15 counts as the Rule 403 'probative value' of an item of evidence, as distinct from its
16 Rule 401 'relevance,' may be calculated by comparing evidentiary alternatives." *Old*
17 *Chief v. U.S.*, 519 U.S. 172, 184 (1997). If an alternative is "found to have
18 substantially the same or greater probative value but a lower danger of unfair
19 prejudice, sound judicial discretion would discount the value of the item first offered
20 and exclude it if its discounted probative value [is] substantially outweighed by
21 unfairly prejudicial risk." *Id.* at 182-83.

22 Evidence of Golar's and LEI's duty to indemnify Warner Bros. will unfairly
23 prejudice Warner Bros. Courts routinely affirm that knowledge of insurance or
24 indemnity arrangements can unfairly impact a jury's judgment. If someone other
25 than the defendant has responsibility for shouldering the cost of liability, the jury
26 will feel less constrained in ruling against the defendant, no matter the strength of
27 his case. *See Posttape Associates v. Eastman Kodak Co.*, 537 F.2d 751, 758 (3rd
28 Cir. 1976) ("Knowledge that a party is insured may also affect a verdict if the jury

1 knows that some of the loss has been paid by insurance or that it would satisfy a
2 judgment against a defendant"). The jury might also construe Warner Bros.' placing
3 Golar and LEI on notice of their duty to indemnify as an admission that the
4 agreements on which Fox bases its claims, which Golar and LEI failed to disclose to
5 Warner Bros., materially impact Warner Bros.' rights to *Watchmen*. They do not,
6 and Warner Bros.' notice of indemnification was in no way an acquiescence to Fox's
7 claims.²

8 Moreover, Fox has an evidentiary alternative of Golar's and LEI's supposed
9 bias or prejudice. Both LEI and Gordon have the right to receive compensation
10 contingent on the picture's proceeds and therefore will benefit if Fox is not
11 successful in obtaining an injunction and the picture is released. Under *Old Chief*,
12 this alternative evidence of bias or prejudice has substantially the same or greater
13 probative value but a lower danger of unfair prejudice, and therefore warrants
14 excluding the indemnification evidence under Rule 403.


15 **IV. CONCLUSION**

16 For the foregoing reasons, this Court should preclude Fox from introducing
17 evidence regarding Golar's and LEI's duty to indemnify Warner Bros.' against Fox's
18 claims and Warner Bros.' communications with them about that duty.

19 Dated: December 17, 2008

20 GLASER, WEIL, FINK, JACOBS, &
SHAPIRO, LLP

21 IRELL & MANELLA LLP

22
23 By: 
24 Laura A. Seigle
Attorneys for Defendants

25
26 ² Evidence of Golar's and LEI's duty to indemnify Warner Bros. will also
27 likely confuse the jury. Both Golar and LEI deny any obligation to indemnify
28 Warner Bros. Given these denials, the jury may incorrectly believe that it needs to
determine whether Golar and LEI owe Warner Bros. a duty to indemnify against
Fox's claims.

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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
14 CORPORATION,

15 Plaintiff,

16 v.

17 WARNER BROS. ENTERTAINMENT,
18 INC.; WB STUDIO ENTERPRISES, INC.;
19 WARNER BROS. PICTURES and DOES 1
20 - 10,

21 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 REFERENCE TO
EVIDENCE OF GOLAR'S AND
LEI'S DUTY TO INDEMNIFY
WARNER BROS. (WARNER BROS.
MOTION *IN LIMINE* NO. 5)**

Date: January 7, 2009

Time: 3:30 p.m.

Courtroom: 740 – Roybal Building

Filing Date: February 8, 2008

Trial Date: January 20, 2009

INTRODUCTION

1
2 In February 2008, within a matter of days of Fox’s filing of this lawsuit,
3 Warner Bros. brought claims against Golar, Inc. (“Golar,” wholly owned by Lawrence
4 Gordon) and Largo Development Projects, Inc. (“LEI”) seeking to hold them liable for
5 the damages Fox sustains in its claim against Warner Bros. The basis for Warner
6 Bros.’ claim is that Gordon and LEI agreed to indemnify Warner Bros. in the May
7 2006 Option from any breach of their representations that Gordon owned rights in
8 *Watchmen*.

9 The promises allegedly breached by Gordon are the core questions in this
10 case – the representation set forth in the May 2006 Option that Gordon owned rights
11 in *Watchmen*. Warner Bros.’ cynical strategy was to exercise the May 2006 Option,
12 with actual knowledge that Gordon had *not* acquired any rights from Fox under the
13 Turnaround Agreement, but then put Gordon on notice that Warner Bros. would hold
14 him liable under the May 2006 Option for any adverse outcome with Fox. After
15 proceeding full steam with making the *Watchmen* movie, and having thus placed
16 Gordon at risk of enormous damages to Warner Bros. if Fox prevails, Warner Bros.
17 now asks this Court to exclude all evidence that Gordon is “on the hook” to Warner
18 Bros. on the indemnity claim and evidence of Warner Bros.’ strategy of exercising the
19 May 2006 Option, despite knowledge of the Turnaround Agreement, for which it
20 planned to hold Gordon responsible.

21 Warner Bros.’ strategy of pressuring Gordon with the indemnity claim
22 has had real impacts – the Court is aware that Gordon’s counsel, at Warner Bros.’
23 urging, was instructed not to answer any questions at deposition about Fox’s rights
24 under the 1994 Settlement Agreement and Turnaround Agreement. And Gordon,
25 soon after receiving Warner Bros.’ claim, in turn claimed malpractice against Tom
26 Hunter and the Bloom Dekhom law firm, the attorneys representing Gordon at the
27 time of the May 2006 Option who failed to surface the 1994 Settlement Agreement
28 and Turnaround Agreement, and who in May 2006 told Warner Bros. not to worry

1 about Fox's distribution rights under the 1991 Quitclaim. The result of this, of course,
2 is that Hunter and his partners, including Stuart Rosenthal, have become closely allied
3 with Warner Bros. to defeat Fox's claims – both Hunter and Rosenthal were prepared
4 to testify at deposition by Warner Bros.' own counsel. If Fox prevails, Warner Bros.
5 is holding Gordon hostage to indemnify Warner Bros. from Fox's damages, and
6 Gordon is looking to his attorneys to satisfy that damages demand, and thus Gordon's
7 counsel is now ready, willing and able to be spoon fed on how to assist Warner Bros.
8 to defeat Fox's claims.

9 In its Motion *In Limine* to Preclude Reference to Evidence of Golar's and
10 LEI's Duty to Indemnify Warner Bros. (Warner Bros. Motion *In Limine* No. 5) (the
11 "Motion *In Limine*") (Dkt. 194, 194-2), Warner Bros. asks the Court to exclude all
12 evidence of Warner Bros. cynical strategy, even though these indemnity and
13 malpractice claims reveal the substantial bias of the witnesses to protect themselves
14 from Warner Bros.' threatened damages claims, and provide evidence bearing on
15 Warner Bros.' wrongful intent to disrupt Fox's contracts with Gordon. Without this
16 evidence, critical information relevant to understanding the motive of key witnesses
17 and Warner Bros.' own motive will be eliminated.

18 The jury is entitled to understand that Warner Bros. is seeking to hold
19 Gordon responsible for the damages Fox sustains. Indeed, Warner Bros.' position is
20 that it can interfere with Fox's contracts with Gordon, but then hold Gordon himself
21 liable for any adverse result. Fox will show at trial this was part of Warner Bros.
22 "legal strategy" all along in exercising the May 2006 Option – it's strategy was that it
23 had everything to gain by attempting to wrongfully deny Fox's rights in *Watchmen* by
24 interfering with the Turnaround Agreement, because it intended that it's wrongful
25 conduct and any resulting damages would later be placed on Gordon's doorstep, thus
26 also motivating Gordon and his attorneys to step in line with Warner Bros.' defense to
27 the case.

28

1 **ARGUMENT**

2 **I. Evidence of Golar and LEI's Indemnification of Warner Bros. Is**
3 **Admissible to Show Bias or Prejudice.**

4 The Ninth Circuit has recently noted that under Fed. R. Evid. 411,
5 "[e]vidence of indemnification is generally inadmissible *but may be used to show*
6 *prejudice or bias of a witness.*" *Philips v. E.I. DuPont de Nemours & Co. (In re*
7 *Hanford Nuclear Reservation Litig.)*, 534 F.3d 986, 1014 (9th Cir. 2008) (emphasis
8 added).

9 Warner Bros. essentially admits that Golar and LEI's indemnification
10 obligation is relevant to the issue of Mr. Gordon's (and his attorneys such as Mr.
11 Hunter's and Mr. Rosenthal's) bias in this matter. Given that they are hardly
12 disinterested in third parties, but rather "on the hook" to cover Warner Bros.'
13 obligations – especially now that Fox has proven its copyright interest – the jury
14 cannot adequately measure the credibility of the witnesses unless it understands that
15 Gordon and his counsel have a tremendous financial incentive to avoid an adverse
16 result for Warner Bros. Allowing these witnesses, especially Mr. Gordon and Mr.
17 Rosenthal, to testify regarding Fox's rights in *Watchmen* and the reasonableness of
18 Warner Bros. rights position, without consideration of the enormous pressure and
19 resulting bias showered on them by Warner Bros., would paint an inaccurate picture
20 and deny the jury proper context.

21 Accordingly, the Court should permit evidence of Golar and LEI's
22 indemnification obligation at trial and Warner Bros.' pointed demands to hold Gordon
23 responsible for Fox's damages. Though Fox disputes that any prejudice would result
24 from such the admission of such evidence, any such issue may be adequately
25 addressed by the issuing of an appropriate jury instruction. *Larez v. Holcomb*, 16 F.3d
26 1513,1518-19 (9th Cir. 1994) (holding that if evidence of indemnification reaches the
27 jury, the court may issue an instruction or admonition to the jury to eliminate any
28 prejudice) (citing *Halladay v. Verschoor*, 381 F.2d 100, 112 (8th Cir. 1967)).

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CONCLUSION

Under Ninth Circuit law, evidence of indemnification is admissible to prove bias or prejudice of a witness. Given that Mr. Gordon and his former attorneys are likely to be critical witnesses for Warner Bros. on the issue of Fox’s rights and Warner Bros.’ faulty clearance of the *Watchmen* chain of title and interference with contract, the issue of their obvious bias – simply put, they stand to lose millions – is of immense probative value. Even assuming that some prejudice might result – and it will not – the Court can simply instruct the jury on the applicable law concerning indemnification agreements. The Court should deny Warner Bros.’ Motion *in Limine* No. 5.

DATED: December 29, 2008

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TWENTIETH CENTURY FOX FILM
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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2008, I caused a copy of **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO WARNER BROS.' MOTION *IN LIMINE* TO PRECLUDE REFERENCE TO EVIDENCE OF GOLAR'S AND LEI'S DUTY TO INDEMNIFY WARNER BROS. (WARNER BROS. MOTION *IN LIMINE* NO. 5)** to be served upon the following counsel in the manner described below:

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TWENTIETH CENTURY FOX FILM CORPORATION

/s/ Louis A. Karasik
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