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9 UNITED STATES DISTRICT COURT

10 CENTRAL DISTRICT OF CALIFORNIA

11 TWENTIETH CENTURY FOX FILM
12 CORPORATION,

13 Plaintiff,

14 v.

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

19 Defendants.

Case No. CV 08-0889 GAF (AJWx)

**NOTICE OF MOTION AND
MOTION BY DEFENDANTS TO
DISMISS PLAINTIFF'S FIRST AND
SECOND CLAIMS FOR RELIEF;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

[FRCP 12(b)(6)]

[Honorable Gary A. Feess]
[Complaint filed: 2/8/08]

Date: May 5, 2008
Time: 9:30 a.m.
Courtroom: 740 – Roybal Building

[Declaration of Kevin J. Leichter and
Appendix of Non-Federal and
Unpublished Authorities filed
concurrently herewith]

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TO PLAINTIFF AND ITS COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on May 5, 2008, at 9:30 a.m., or as soon thereafter as the matter may be heard in Courtroom 740 of the above-entitled Court, located at 255 E. Temple Street, Los Angeles, California 90012, Defendants Warner Bros. Entertainment Inc. and WB Studio Enterprises Inc. (on behalf of itself and its division, Warner Bros. Pictures (“WBP”)) (collectively, “Defendants”) will and hereby do move the Court as follows: (i) to dismiss the First Claim for Relief in Plaintiff Twentieth Century Fox Film Corporation’s (“Fox” or “Plaintiff”) Complaint (“Complaint”) pursuant to Federal Rule of Civil Procedure 12(b)(6); and (ii) to dismiss the Second Claim for Relief in the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

This Motion is based on the following grounds:

(1) Plaintiff’s First Claim for Relief for copyright infringement under 17 U.S.C. § 101, *et seq.* fails to state a claim for which relief may be granted because neither of the agreements upon which Plaintiff relies – namely, the 1991 Quitclaim Agreement (the “1991 Quitclaim”) between Plaintiff and Largo International, N.V. or the 1994 Turnaround Notice between Plaintiff and producer Lawrence Gordon (and associated entities) – creates a copyright interest cognizable under the Copyright Act, and thus Plaintiff lacks standing under the Copyright Act to assert a claim for infringement.

(2) Plaintiff’s Second Claim for Relief for interference with contract under California law fails to state a claim because Plaintiff admits in the Complaint that Defendants had no knowledge of Golar Inc.’s (“Golar”) alleged obligations to Plaintiff under the 1991 Quitclaim and, accordingly, Defendants could not have intended to interfere with such contractual obligations. Plaintiff’s interference claim also fails because Plaintiff has alleged that WBP has assumed and/or is a party to the very contractual obligations which it is alleged to have interfered with, namely, the obligations to Plaintiff under the 1991 Quitclaim, and it is well settled that one cannot

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1 tortiously interfere with one's own contract, nor can the mere act of assuming a contract
2 constitute interference.

3 This Motion is based upon this Notice of Motion and Motion, the accompanying
4 Memorandum of Points and Authorities, the Declaration of Kevin J. Leichter filed
5 concurrently herewith, the pleadings in this action and such other evidence and
6 argument as the Court may allow.

7 This Motion was made following the conference of counsel pursuant to Local
8 Rule 7-3 which took place on March 28, 2008. (Declaration of Kevin J. Leichter, ¶ 2.)

9 Dated: April 7, 2008

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MEMORANDUM OF POINTS AND AUTHORITIES

1
2 Defendants Warner Bros. Entertainment Inc. and WB Studio Enterprises Inc. (on
3 behalf of itself and its division, Warner Bros. Pictures (“WBP”)) (collectively,
4 “Defendants”) respectfully submit the following Memorandum of Points and
5 Authorities in support of their Motion to Dismiss the First and Second Claims for
6 Relief in Plaintiff Twentieth Century Fox Film Corporation’s (“Fox” or “Plaintiff”)
7 Complaint.

8 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

9 In 1991, Plaintiff Fox abandoned development of the motion picture project
10 entitled *Watchmen*, quitclaiming away all of its rights in the underlying literary works.
11 In 1994, Plaintiff severed its entire relationship with the project's producer, Lawrence
12 Gordon, placing the project in "turnaround" to Gordon, who by that point owned all of
13 the rights to the project. In the ensuing years, the project was presented to numerous
14 Hollywood studios, large and small, was in active development at two major studios,
15 and was even “greenlit” for production, with Plaintiff’s full knowledge, at a third major
16 studio. Seventeen years after Plaintiff quitclaimed its rights, and fourteen years after
17 Plaintiff released its producer, the project landed at Defendant WBP, which then
18 devoted years of hard work and expended many tens of millions of dollars to acquire
19 other necessary rights and to develop and produce an exciting new major motion
20 picture.

21 After more than a decade of inaction, Plaintiff has suddenly emerged to claim the
22 sole right to distribute and exhibit the picture worldwide – in theatres, on cable and
23 broadcast television, and on video/DVD – to the complete exclusion of Defendants
24 who are actually making the picture and expending vast sums to do so. To advance this
25 opportunistic claim, Plaintiff presents the Court with a series of contorted arguments
26 that defy common sense, settled law, and the plain language of the very documents
27 upon which the arguments are based. Because the failures of Plaintiff’s claims are
28 conclusively evidenced by the application of established law to the very documents

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1 upon which Plaintiff relies, the copyright and interference claims can and should be
2 dismissed pursuant to Rule 12(b).

3 **A. Copyright Claims.**

4 The centerpiece of Plaintiff's case, and the sole basis for federal jurisdiction, is
5 its First Claim for Relief for copyright infringement. That claim is phrased in the
6 alternative, based on two separate documents: (1) a 1991 Quitclaim Agreement
7 between long-defunct Largo International, N.V. ("Largo") and Plaintiff (the "1991
8 Quitclaim") and (2) a 1994 Turnaround Notice (the "1994 Turnaround Notice")
9 between Plaintiff and producer Lawrence Gordon and Lawrence Gordon Productions,
10 Inc. (collectively, "Gordon"). But neither of these agreements grants a present
11 copyright interest or otherwise provides a basis to state a claim for copyright
12 infringement, which absolutely requires, as a matter of law, that the party presenting the
13 claim be the present owner of a legally recognized copyright interest.

14 **1. 1991 Quitclaim.**

15 The 1991 Quitclaim was a flat-out grant *by Plaintiff* to Largo, Gordon's
16 predecessor in interest, of "all of Plaintiff's right, title and interest in and to" the
17 *Watchmen* project and its underlying material. One of its ancillary provisions recites
18 that Plaintiff would distribute the picture "if" it was made by Largo "pursuant to" the
19 then-existing relationship between Plaintiff and Largo.

20 However, Largo was subsequently dissolved, and following the dissolution of
21 Largo, the 1991 Quitclaim was expressly superseded by a 1994 Settlement and Release
22 Agreement between Plaintiff and Gordon and Gordon's affiliated entities (the "1994
23 Settlement Agreement") – of which the 1994 Turnaround Notice is a part. (Both are
24 attached to Plaintiff's Complaint.) Significantly, that settlement agreement expressly
25 recites that it embodies the "entire agreement" between Plaintiff and Gordon and
26 Gordon's affiliated entities with respect to *Watchmen*, and further provides that it
27 "supersedes" all previous agreements and understandings with respect to that project.

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1 Put another way, in one of the very agreements upon which it now relies, Plaintiff
2 expressly abrogated the other.

3 Even if the plain language of the 1994 Settlement Agreement, were not enough,
4 the fact that the prior contractual arrangements with Largo were superseded is well
5 evidenced by Plaintiff's own Complaint, which fails to even attempt to allege the
6 existence or satisfaction of any of the express conditions precedent contained in the
7 prior agreements between Fox and Largo with respect to *Watchmen* – conditions
8 precedent that expressly needed to be satisfied before Plaintiff's rights would or could
9 "vest" or become "effective." Of course, the reason why Plaintiff cannot allege either
10 satisfaction or excuse of these conditions (such as paying a production advance) is that
11 the entire relationship between Largo and Plaintiff ended with the dissolution of Largo.

12 Plaintiff's second basis for its copyright claim is the "Changed Elements"
13 provision of the 1994 Turnaround Notice – a document that was never recorded and
14 which is not alleged to have been known to Defendants. Regardless of notice,
15 however, that document nowhere refers to distribution rights, and does not grant to
16 Plaintiff the sort of exclusive right that gives rise to a protectable copyright interest – in
17 fact, it contains no rights-granting language at all. Rather, the "Changed Elements"
18 provision is merely an option to develop and/or produce a motion picture, which by law
19 is not an exclusive right conferred on the owner of a copyright pursuant to Section 106
20 of the Copyright Act. As a matter of law, an unexercised option is not sufficient to
21 confer standing to sue for copyright infringement under Section 501(b) of the
22 Copyright Act.

23 The copyright claims fail, and should be dismissed.

24 **B. Interference Claim.**

25 In its Second Claim for Relief, Plaintiff alleges that Defendants interfered with
26 the obligations owed to Plaintiff under the 1991 Quitclaim, a claim that requires
27 allegations of both knowledge and intent. Although these elements are conclusorily
28 alleged, Plaintiff expressly *admits* in the Complaint that Defendants did not have

1 knowledge of Golar’s alleged obligations to Plaintiff under the 1991 Quitclaim.
2 (Compl., ¶ 18.) In particular, the Complaint alleges that Defendants "incorrectly"
3 believed that Plaintiff had quitclaimed all of its right, title and interest to *Watchmen*
4 under the 1991 Quitclaim, and thus was owed no contractual duties with respect to
5 *Watchmen* under that agreement. *Id.* Because Plaintiff’s complaint admits that
6 Defendants were not aware of the recently asserted contractual obligation that they are
7 now alleged to have interfered with, the required element of knowledge is lacking, and
8 necessarily so is the requisite intent to interfere.

9 More fundamentally, though, this is a claim that violates the very principles
10 underlying the tort of contract interference. Plaintiff asserts that WBP acted wrongly
11 because, under the Option/Quitclaim Agreement between WBP and Golar, successor to
12 Largo (the “WBP Agreement”), WBP promised to assume Largo’s obligations under
13 the 1991 Quitclaim. But it is inconceivable that the act of assuming a contract could
14 ever be legally construed as interference; nonetheless, that is the essence of Plaintiff’s
15 claim. The act of assumption frustrates no performance, causes no damage, and
16 violates no conceivable public policy; the law cannot be that a promise to perform
17 another’s agreement is tortious. What such a promise does, in truth, is to make the
18 assuming party a contracting party, and it is axiomatic that a party cannot tortiously
19 interfere with its own contract.

20 **C. Leave to Amend.**

21 Finally, because Plaintiff is unable to cure any of the foregoing deficiencies by
22 amending its Complaint, the Court should grant this motion without leave to amend and
23 enter an order dismissing Plaintiff’s First and Second Claims for Relief.
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1 **II. STATEMENT OF FACTS¹**

2 **A. In 1991, Plaintiff Quitclaimed All Its Rights In *Watchmen* To Largo.**

3 In or about June 17, 1991, Plaintiff entered into the 1991 Quitclaim Agreement
4 and accompanying Short Form Quitclaim (collectively, the "1991 Quitclaim"), with
5 Largo² whereby Plaintiff agreed to and did quitclaim to Largo: (1) "all of Fox's right,
6 title and interest in and to the Motion Picture project presently entitled 'WATCHMEN';
7 and (2) "all of [Plaintiff's] present, and future right, title and interest in and to the
8 literary work, a graphic novel entitled 'WATCHMEN,' . . . and screenplay material
9 based thereon . . . including without limitation, any and all synopses, treatments,
10 scenarios, screenplays and all copyrights in connection therewith and all tangible and
11 intangible properties respecting all of the foregoing, whether in existence or now
12 known or in the future and all interests under all agreements pertaining to the
13 development of the literary work as a motion picture." (1991 Quitclaim, § 2; Short
14 Form Quitclaim.) This grant is unequivocal and complete and operated to completely

15
16 ¹ Consistent with applicable standards under Rule 12(b)(6) and settled case law, the
17 facts set forth herein are derived from the face of the Complaint and the documents
18 attached thereto, or from documents referenced in the Complaint and of unquestioned
19 authenticity. Hal Roach Studios, Inc. v. Richard Finer & Co., Inc., 896 F.2d 1542,
20 1555, fn. 19 (9th Cir. 1989) (material which is submitted as part of the complaint may
21 be considered in ruling on a 12(b)(6) motion to dismiss such complaint); Branch v.
22 Tunnel, 14 F.2d 449, 453 (9th Cir. 1994) ("...documents whose contents are alleged in
23 a complaint and whose authenticity no party questions, but which are not physically
24 attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to
25 dismiss."). The 1991 Quitclaim, Short Form Quitclaim, Largo Domestic Agreement,
26 Amendment No. 1, the 1994 Settlement Agreement and the 1994 Turnaround Notice
27 are attached to the Complaint, and the Largo Foreign Agreement and the WBP
28 Agreement are expressly referred to in the Complaint and are of unquestioned
authenticity. Thus, the Court may properly consider these documents in ruling on this
motion, disregarding conflicting allegations. For the Court's convenient reference, the
Complaint and the exhibits thereto are attached as Exhibit "A" to the Declaration of
Kevin J. Leichter ("Leichter Decl.").

² Largo was a joint venture, one of whose principal members was Golar, Inc., a
company owned and controlled by producer Lawrence Gordon. (Compl., ¶ 13.) In
1993, Largo was dissolved and assigned its rights in the *Watchmen* project to Golar.
(Compl., ¶ 13.)

1 divest Plaintiff of any rights under copyright law.. (The 1991 Quitclaim is attached as
2 Exhibit 2 to the Complaint at pages 42-53.)

3 In addition to this grant of rights, the 1991 Quitclaim makes a reference to the
4 parties' then-ongoing relationship, pursuant to which Largo would produce a slate of
5 pictures, at Plaintiff's initial expense, which Plaintiff would then distribute.
6 Specifically, an ancillary provision in the 1991 Quitclaim recites that, "if" Largo were
7 to elect to proceed to produce *Watchmen*, the picture would be deemed a "Subject
8 Picture" under that arrangement and would be produced "by Largo" and distributed "by
9 [Plaintiff] Fox" "pursuant to" the terms of the Domestic Distribution Agreement
10 between Largo and Plaintiff entered into on or around February 1, 1990, as amended by
11 certain Supplemental Agreements also dated February 1, 1990 ("Largo Domestic
12 Agreement"), the Foreign Film Lease Agreement between Fox and Largo dated as of
13 May 25, 1990 ("Largo Foreign Agreement") and the Advance Agreement dated as of
14 February 1, 1990 between Plaintiff and Largo (collectively, the "Largo Agreement").
15 (1991 Quitclaim, §§ 1, 5.)

16 Section 7 of the Largo Domestic Agreement ("Section 7") provided that Largo
17 would license to Plaintiff all rights to exhibit the Subject Pictures, including *Watchmen*,
18 in the Domestic Territory as defined in that agreement. (Largo Domestic Agreement, §
19 7.) But Section 7, dealing with ownership of rights, expressly provided that such rights
20 would only become effective or vest upon Plaintiff's payment of a Production Advance
21 as defined in that agreement with respect to *Watchmen* and that Largo "shall own and
22 control the *exclusive copyright* in the Subject Pictures," including *Watchmen*. (Largo
23 Domestic Agreement, § 7.) (The Largo Domestic Agreement is attached as Exhibit 3 to
24 the Complaint at pages 54-90.)

25 Similarly, Section 5 of the Largo Foreign Agreement provided that Largo would
26 license to Plaintiff the rights to exhibit the Subject Pictures, including *Watchmen*, in the
27 Foreign Territory as defined in that agreement. (Largo Foreign Agreement, § 5.) As in
28 the case with the Largo Domestic Agreement, Section 5 provided that these rights did

1 not become "effective" or "vest" until Plaintiff satisfied a condition precedent, namely,
 2 the payment of an Advance Rental as defined in that agreement. (Largo Foreign
 3 Agreement, § 5.) Section 5 further stated that Largo or an affiliate of Largo "shall own
 4 and control" the *exclusive copyright* in the Subject Pictures, including *Watchmen*.
 5 (Largo Foreign Agreement, § 5.) (The Largo Foreign Agreement is attached as Exhibit
 6 "B" to the Leichter Declaration.)

7 Five months after entering into the 1991 Quitclaim Agreement, Plaintiff and
 8 Largo determined to modify some of their rights and obligations under the Largo
 9 Domestic Agreement by entering into Amendment No. 1 to the Agreement
 10 ("Amendment No. 1") dated as of November 15, 1991. Amendment No. 1 expressly
 11 recited that "Largo shall own and control the exclusive copyright on all Subject
 12 Pictures, including Future Subject Pictures." (*Id.*) It also expressly provided that
 13 Plaintiff's domestic distribution rights would "only become effective upon, and the
 14 rights of the Fox Parties shall only vest upon, the initial payment by Fox of the
 15 Production Advance" with respect to Subject Pictures and Future Subject Pictures,
 16 including *Watchmen*. (Amendment No. 1, § 5; Amendment No. 1 is attached as Exhibit
 17 4 to the Complaint at pages 91-106). As noted elsewhere, the Complaint does not
 18 allege satisfaction or excuse of any of these conditions.

19 **B. In 1994, Plaintiff Abandoned Development of *Watchmen***

20 In 1993, Largo was dissolved (Compl., ¶ 13), and a few months later, in July
 21 1994, Plaintiff and Producer Gordon formally parted ways forever. In connection with
 22 that parting, Plaintiff and Gordon entered into a settlement agreement pursuant to
 23 which Plaintiff abandoned any further development of *Watchmen* and determined to put
 24 the project "in perpetual turnaround" to Gordon. (1994 Settlement Agreement, Recital
 25 B, § 4.)³

26 ³ In industry parlance, the term "turnaround" means that a producer is given the right
 27 to "take the project, call it his own and try to set it up at another studio or third party
 28 financing." Buchwald v. Paramount Pictures Corp., 13 U.S.P.Q. 2d 1497, *14, fn. 3,
 (Cal. Sup. Ct. 1990).

1 The 1994 Settlement Agreement was entered into between Plaintiff and Gordon,
 2 on behalf of himself and all entities owned or controlled or affiliated with him. (1994
 3 Settlement Agreement, preamble.) It expressly provided that, taken together with the
 4 1994 Turnaround Notice appended as an incorporated exhibit, it embodied the “entire
 5 agreement” between Plaintiff, on the one hand, Gordon and all of his associated
 6 entities, on the other hand, with respect to *Watchmen* and that such agreement
 7 “superseded” the parties’ previous agreements and understandings with respect to the
 8 project, which plainly included the 1991 Quitclaim. (1994 Settlement Agreement, § 8;
 9 the 1994 Settlement Agreement and the 1994 Turnaround Notice are attached as
 10 Exhibit 5 to the Complaint.)⁴

11 The 1994 Turnaround Notice stated that Plaintiff has elected not to proceed with
 12 the further development or production of *Watchmen* and requires payment of a Buy-Out
 13 Price equal to Plaintiff’s investment in the project, payable by Gordon if the project
 14 were ever produced. (1994 Turnaround Notice, § 1). The 1994 Turnaround Notice
 15 further provided that if, prior to paying Plaintiff the Buy-Out Price, Gordon introduced
 16 changes to the project’s existing elements (e.g., change in the director, principal cast,
 17 the storyline or reduction of the budget) or financial terms of such elements, Gordon
 18 would submit to Plaintiff such changed elements and changed terms (“Changed
 19 Elements”), and Plaintiff would have the right within a certain time period to proceed
 20 with the development and/or production of the project predicated on such Changed
 21 Elements. (1994 Turnaround Notice, § 4.)

22
 23
 24 ⁴ Plaintiff did not initially attach a copy of the 1994 Settlement Agreement to the
 25 Complaint, and the document which was originally attached to the Complaint as
 26 Exhibit 5 and alleged to be the 1994 Turnaround Notice was inadvertently not a copy
 27 of that document. When this was brought to Plaintiff’s attention, the parties entered
 28 into a Stipulation dated March 3, 2008, later approved by the Court pursuant to Order
 dated March 4, 2008, attaching true and correct copies of the 1994 Settlement
 Agreement and the 1994 Turnaround Notice and substituting these documents for the
 version of Exhibit 5 which was attached to the original Complaint. (Leichter Decl., ¶
 3, fn. 1.)

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C. In 2006, Golar Granted To WBP The Option To Acquire All Rights In The *Watchmen* Project, And WBP Exercised Such Option.

Twelve years later (as of May 4, 2006), Warner Bros. Pictures (“WBP”), on the one hand, and Golar and LEI Development Projects, Inc. (“LEI”) (as successors in interest to Largo), on the other hand, entered into an Option/Quitclaim Agreement, pursuant to which Golar and LEI granted to WBP the sole and exclusive option to acquire all of their right, title and interest in and to the literary property comprising *Watchmen* (the “WBP Agreement”). (WBP Agreement, § 3.) The WBP Agreement further provided that, if WBP were to exercise the option, WBP would perform each of the extant terms and conditions of the agreements relating to *Watchmen* listed in the WBP Agreement, such as the 1991 Quitclaim. The Largo Agreement was *not* listed in the WBP Agreement. (WBP Agreement, §§ 1.2, 4.3, 6.)

WBP later exercised the option granted to it in the WBP Agreement. (The WBP Agreement is attached as Exhibit “C” to the Leichter Declaration.)

III. PLAINTIFF’S CLAIM FOR COPYRIGHT INFRINGEMENT FAILS BECAUSE NEITHER THE 1991 QUITCLAIM NOR THE 1994 TURNAROUND NOTICE GIVES RISE TO SUCH CLAIM.

A. The 1991 Quitclaim Does Not Give Plaintiff A Basis For A Claim Of Distribution Rights.

1. The 1991 Quitclaim Was Superseded By The 1994 Settlement Agreement.

The 1994 Settlement Agreement – of which the 1994 Turnaround Notice is a part, as an incorporated exhibit – embodies the entire agreement between Plaintiff and Gordon and Gordon’s affiliated entities (“the Gordon Parties”) with respect to *Watchmen* and expressly supersedes the parties’ previous agreements and understandings with respect to the property, including the 1991 Quitclaim:

1 This Agreement, together with...Exhibit 'C,'⁵ the Turnaround Notice for
 2 'WATCHMEN,' embodies *the entire agreement* . . . between Fox and
 3 Gordon as to the subject matter hereof, and *supersedes* all previous or
 4 contemporaneous agreements, understandings, communications,
 5 warranties or representations as between Fox and Gordon, either oral or
 6 written, which may have been made between Fox and Gordon regarding
 7 the subject matter thereof.... In connection with the foregoing, Fox and
 8 Gordon hereby acknowledge that *neither party has any rights or*
 9 *obligations to the other* with respect to the subject matter hereof *except* as
 10 set forth in (a) this Settlement Agreement, [several documents pertaining
 11 to other motion picture properties] and (e) Watchmen Turnaround Notice,
 12 as the same may be amended, modified, supplemented, superseded or
 13 restated.

14 (1994 Settlement Agreement, § 8 (emphasis added).)

15 The 1994 Settlement Agreement defines the term "Gordon" as including Gordon
 16 and "all corporations or entities owned or controlled by or affiliated or associated with
 17 [him]." (1994 Settlement Agreement, ¶ 1.) The term "Gordon" thus includes Gordon
 18 entities Largo and Golar insofar that Paragraph 13 of the Complaint alleges that "Largo
 19 was a joint venture, one of whose principal members was [Golar], a company owned
 20 and controlled by [Gordon]." Paragraph 13 of the Complaint also alleges that Largo
 21 assigned, transferred and conveyed to Golar all of its rights in *Watchmen* in November
 22 1993. Thus, according to the Complaint itself, the 1994 Settlement Agreement
 23 superseded all agreements with Gordon, Golar and Largo and stood as the sole
 24 expression of their contractual duties.

25
 26 ⁵ Section 8 states that the parties' agreement also includes the provisions in two other
 27 attachments, namely, the Definition of Net Profits ("Exhibit A") and the Short Form
 28 Quitclaim (Exhibit "B"), provisions that are not pertinent because they do not apply to
Watchmen.

1 Accordingly, the 1991 Quitclaim was superseded and rendered a nullity by the
 2 1994 Settlement Agreement, and the only remaining contractual provisions governing
 3 the interest of Plaintiff and Gordon and Gordon's affiliated entities in *Watchmen* are set
 4 forth in the 1994 Settlement Agreement and the accompanying 1994 Turnaround
 5 Notice. The 1991 Quitclaim cannot be the basis of a lawsuit today.

6 This conclusion is compelled by not only the plain language of the Parties'
 7 integration clause, but also by the law of integration. It is axiomatic that, when the
 8 parties to a contract have agreed that it is an "integration" – a complete and final
 9 embodiment of the terms of an agreement – parol evidence cannot be used to add to or
 10 vary [the contract's] terms." Masterson v. Sine, 68 Cal. 2d 222, 225, 55 Cal. Rptr. 545
 11 (1968). California courts have stated that the crucial issue in determining whether there
 12 has been integration is "whether the parties intended their writing to serve as the
 13 exclusive embodiment of their agreement" and that such determination is to be made
 14 "solely from the face of the instrument." Masterson, 68 Cal. 2d at 225-26.

15 The parties to the 1994 Settlement Agreement could not have used clearer
 16 language to express their intent that such agreement was a final and complete
 17 integration of all prior and contemporaneous writings and agreements related to the
 18 rights of Plaintiff and Gordon and Gordon's affiliated entities in *Watchmen*. In fact,
 19 that is exactly what the parties said "on the face of the instrument" they signed. (1994
 20 Settlement Agreement, § 8.)

21 Moreover, the fact that the parties intended the 1994 Settlement Agreement to
 22 supersede all prior agreements is entirely supported by Plaintiff's failure to allege the
 23 existence or satisfaction of the express conditions precedent contained in prior
 24 agreements. Section 5 of Amendment No. 1 – signed *after* the 1991 Quitclaim –
 25 expressly provides that the domestic distribution rights licensed to Plaintiff and certain
 26 of its affiliated entities under that agreement would only become effective and vest
 27 upon Plaintiff's payment of a Production Advance with respect to *Watchmen* as defined
 28 therein: "Notwithstanding any other provision of the Domestic Agreement [as

1 modified], the grant to the Fox Parties of the rights to distribute a Subject Picture
 2 pursuant to the terms of the Domestic Agreement [as modified] *shall only become*
 3 *effective upon*, and the rights of the Fox Parties *shall vest upon*, the initial payment by
 4 Fox of the Production Advance with respect to such Subject Picture....” (Amendment
 5 No. 1, § 5 (emphasis added).)

6 Similarly, Section 5 of the Largo Foreign Agreement expressly provides that the
 7 foreign distribution rights leased to Plaintiff under that agreement only become
 8 effective and vest upon Plaintiff’s payment of an Advance Rental with respect to
 9 *Watchmen* as defined in that agreement: “Notwithstanding the foregoing provisions of
 10 this Paragraph 5, the grant to Fox of the rights to distribute a Subject Picture [including
 11 *Watchmen*] pursuant to the terms of this Largo Foreign ... Agreement shall only
 12 become effective upon, and Fox’s rights shall only vest upon, payment by Fox of the
 13 Advance Rental with respect to such Subject Picture....” (Largo Foreign Agreement, §
 14 5.)

15 Plaintiff’s failure to allege satisfaction or excuse of these conditions precedent
 16 makes perfect sense: These conditions were never even attempted to be met for the
 17 simple reason that the Largo arrangements had died along with Largo, and the 1994
 18 Settlement Agreement was intended, as it expressly states, to extinguish any and all
 19 prior obligations between them in connection with the *Watchmen* project.

20 In sum, because the 1991 Quitclaim was superseded by a later fully integrated
 21 written agreement, it cannot be the basis for any claim.

22 **B. Plaintiff Cannot Premise Its Copyright Claim On The Changed**
 23 **Elements Provision Of The 1994 Turnaround Notice.**

24 Plaintiff’s second argument is that it obtained exclusive copyright interests to
 25 *Watchmen* under the Changed Elements provision of the 1994 Turnaround Notice
 26 (described in Section II.B. above). (Complaint, ¶ 25b.) But this effort also founders on
 27 the rock of copyright law, because the Changed Elements provision does not grant to
 28 Plaintiff an exclusive copyright interest recognized under the Copyright Act.

1 Nowhere in the 1994 Turnaround Notice is there language constituting a grant of
 2 rights to Plaintiff. Rather, the operative language of the 1994 Turnaround Notice
 3 merely entitles Plaintiff to have the project presented to it, and offers an option upon
 4 such presentation to elect to proceed to production upon such conditions as may then be
 5 attached to the project.

6 Because it is an option or right of first refusal, the Changed Elements provision
 7 does not result in a transfer of copyright ownership or make Plaintiff the current legal
 8 or beneficial owner of an exclusive right under a copyright – an absolute requirement
 9 under Section 501(b) of the Copyright Act that must exist in order to institute an action
 10 for copyright infringement. Section 501(b) of the Copyright Act provides that “[t]he
 11 legal or beneficial owner of an *exclusive* right under a copyright is entitled . . . to
 12 institute an action for any infringement of that particular right committed while he or
 13 she is the owner of it.” 17 U.S.C. § 501(b). Section 101 of the Copyright Act defines a
 14 “transfer of copyright ownership” as follows: “an assignment, mortgage, exclusive
 15 license, or other conveyance, alienation, or hypothecation of a copyright or of any of
 16 the exclusive rights comprised in a copyright, whether or not it is limited in time or
 17 place of effect, but not including a non-exclusive license.” 17 U.S.C. § 101.

18 Courts have held that the holders of unexercised options for copyright interests
 19 do not have standing to sue for copyright infringement under Section 501(b) because
 20 they are not the legal or beneficial owner of a copyright. Silberman v. Innovation
 21 Luggage, Inc., 2003 U.S. Dist. LEXIS 5420, *34, 67 U.S.P.Q. 2d (BNA) 1489
 22 (S.D.N.Y. April 3, 2003) (“[plaintiff’s] option to purchase [the work] does not confer
 23 upon [plaintiff] the status of legal or beneficial owner in the copyrighted work required
 24 for standing under 17 U.S.C. § 501(b)"); Cavallo, Ruffalo & Fagnoli v. Torrez, 1988
 25 WL 161313, *1-2 (C.D. Cal. December 12, 1988) (Wilson, J.) (holder of an option to
 26 purchase the exclusive license to reproduce a copyrighted work lacked standing to sue
 27 for copyright infringement); Hearn v. Meyer, 664 F. Supp. 832, 840-44 (S.D.N.Y. 1987)

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1 (holder of contingent assignment of copyright interest that did not become effective
2 unless certain events took place lacked standing to bring copyright infringement claim).

3 For example, in Cavallo, Ruffalo & Fagnoli, 1988 WL 161313 at *1-2, this
4 Court dismissed a copyright infringement claim on the express ground that the holder
5 of an unexercised option in copyrighted films lacks standing under Section 501(b) to
6 bring an action for copyright infringement. In reaching its ruling, this Court reasoned
7 that “[i]f holders of an unexercised option in a copyrighted work are granted standing,
8 then the Copyright Act and its array of draconian remedies would be available to any
9 person with a right – no matter how remote – to potentially claim a copyright in the
10 future. Id. at *2. “[C]opyright standing would then have to be conferred on persons
11 who have rights to match a third party’s offer before the copyrighted work could be
12 sold to that third party (“right of first refusal”) or to be the first to negotiate for the
13 copyrighted work (“right of first negotiation”). Id. at *2. The same result must obtain
14 here.

15 Concluding that the Changed Elements provision has conferred on Plaintiff the
16 legal or beneficial ownership of a copyright interest in *Watchmen* would cause the very
17 result about which the court was concerned in Cavallo, Ruffalo & Fagnoli,⁶ namely, to
18 confer copyright standing on Plaintiff, whose alleged copyright interest is contingent,
19 theoretical, speculative and remote.

20 As a matter of law, the Changed Elements provision cannot give rise to a claim
21 for copyright infringement.
22
23
24

25 ⁶ The Court may consider the decision in Cavallo, Ruffalo & Fagnoli v. Torrez, 1988
26 WL 161313, although that decision is unpublished. See Herring v. Teradyne, Inc.,
27 256 F. Supp. 2d 1118, 1127-28, fn. 2 (S.D. Cal. November 7, 2002) (9th Circuit Rule
28 36-3 does not bar consideration of unpublished decisions from district courts in the
Ninth Circuit), aff’d in part and rev’d in part on other grounds, Herring v. Teradyne,
Inc., 2007 U.S. App. LEXIS 17175 (9th Cir. July 13, 2007).

1 **IV. PLAINTIFF'S INTERFERENCE WITH CONTRACT CLAIM IS**
 2 **DEFICIENT AS A MATTER OF LAW.**

3 Plaintiff must plead the following elements to state a claim for intentional
 4 interference with contract relations: "(1) a valid contract between plaintiff and a third
 5 party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts
 6 designed to induce a breach or a disruption of the contractual relationship; (4) actual
 7 breach or disruption of the contractual relationships; and (5) resulting damage. Pacific
 8 Gas & Electric Co. v. Bear Stearns & Co., 50 Cal.3d 1118, 1126, 270 Cal. Rptr. 1
 9 (1990). Plaintiffs' interference with contract claim is legally deficient because it has
 10 failed to plead at least three of these requisite elements.

11 First, if the defendant had no knowledge of the existence of the contractual
 12 obligation with which he is alleged to have interfered, he cannot be held liable though
 13 an actual breach results from lawful and proper acts. See Seaman's Direct Buying
 14 Service, Inc. v. Standard Oil Co., 36 Cal. 3d 752, 765, 206 Cal. Rptr. 354 (1984)
 15 (overruled on other grounds). In support of the element of knowledge, Plaintiff
 16 conclusorily alleges that "[a]t the time of the WBP Agreement, or before, WBP and the
 17 other Defendants had actual knowledge of the contractual obligation owed to [Plaintiff]
 18 under the 1991 Quitclaim," and that Golar is the contractual successor and assignee of
 19 rights in *Watchmen* under the 1991 Quitclaim and owes Plaintiff all of the contracted
 20 obligations by Largo under the 1991 Quitclaim. (Complaint, ¶¶ 32, 33). This
 21 conclusory allegation is defective because it is refuted (1) by Plaintiff's own specific
 22 allegations, which admit that Defendants were not aware that Golar owed the now-
 23 claimed obligations to Plaintiff under the 1991 Quitclaim, and (2) by the express terms
 24 of the WBP Agreement.

25 Specifically, Paragraph 18 of the Complaint alleges that Defendants believed that
 26 Plaintiff had quitclaimed all of its right, title and interest to *Watchmen* under the 1991
 27 Quitclaim, and thus, was owed no duties with respect to *Watchmen* under that
 28 agreement: "For example, the WBP Agreement incorrectly states that under the 1991

1 Quitclaim, Fox quitclaims all of its right, title and interest in *Watchmen* [to Largo].”
 2 (Complaint, ¶ 18.)

3 Additional provisions of the WBP Agreement further demonstrate that
 4 Defendants were not aware that Golar owed contractual obligations to Plaintiff in
 5 connection with *Watchmen*. Section 2 of the WBP Agreement provides that Golar
 6 represents and warrants that it is the “sole and exclusive owner” throughout the
 7 universe of “*all rights*” in *Watchmen*; that all sums due and payable in connection with
 8 *Watchmen* have been paid and all other obligations set forth in the documents listed in
 9 the WBP Agreement required to be performed by Golar and Largo have been
 10 performed; that Golar has not sold, assigned, mortgaged, pledged, granted, licensed, or
 11 otherwise disposed of or transferred in any manner to any person, entity, or corporation
 12 any rights to *Watchmen*; that to the best of Golar and Largo's knowledge, or to the
 13 extent they should have known in the exercise of reasonable prudence, there are no
 14 adverse claims in or against *Watchmen*; and that to the best of Golar's knowledge, or to
 15 the extent of the knowledge which Golar should have had in the exercise of reasonable
 16 prudence, there are no documents, contracts, agreements, certificates, assignments, or
 17 instruments other than those listed in the WBP Agreement (a list that does *not* include
 18 the Largo Agreement pursuant to which Plaintiffs allege that they obtained distribution
 19 rights with respect to *Watchmen*). (WBP Agreement, § 2.)

20 In short, both the Complaint and the WBP Agreement make it plain that
 21 Defendants could not have been aware of the claims that Plaintiff has now come
 22 forward to assert. Without such knowledge, there can be no claim of interference as a
 23 matter of law.

24 Second, in order to prevail on a claim for intentional interference, the plaintiff
 25 must plead and prove intentional acts on the part of the defendant which were designed
 26 to disrupt the contractual relationship. See Kasparian v. County of Los Angeles, 38
 27 Cal. App. 4th 242, 262, 45 Cal. Rptr. 2d 90 (1995). “The essential thing is the *purpose*
 28 *to cause the result*. If the actor does not have this purpose, his conduct does not subject

1 him to liability under this rule *even if it has the unintended effect of deterring the third*
 2 *person from dealing with the other.* It is not enough that the actor intended to perform
 3 the acts which caused the result – he or she *must have intended to cause the result*
 4 *itself.”* Id. at 261 (citations omitted) (emphasis in original); see also Seaman’s Direct
 5 Buying Service, Inc. v. Standard Oil Co., 36 Cal. 3d 752, 765, 206 Cal. Rptr. 354
 6 (1984) (reversing judgment on intentional interference claim because there was no
 7 evidence that defendant acted with the purpose or design of causing plaintiff to breach
 8 its contract with a third party and such breach was merely an incidental if foreseeable
 9 consequence of defendant’s action) (overruled on other grounds).

10 It is elemental that the defendant lacks the requisite intent to be liable for
 11 intentional interference with contract if it is not aware of the contractual obligation with
 12 which it is alleged to have interfered. Summit Machine Tool Manufacturing Corp. v.
 13 Victor CNC Systems, Inc., 7 F.3d 1434, 1442-43 (9th Cir. 1993) (dismissing intentional
 14 interference claim for lack of requisite intent because plaintiff could not show that
 15 defendant had any knowledge of the contract which was allegedly interfered with);
 16 DeVoto v. Pacific Fid. Life Ins. Co., 618 F.2d 1340, 1347-49 (9th Cir. 1980) (holding
 17 that defendants lacked requisite intent because they were not aware of the prospective
 18 economic relationships between plaintiffs and the breaching third party). Here, lack of
 19 awareness of Plaintiff’s current construction of the 1991 Quitclaim appears on the face
 20 of the very document that is alleged to be the act of interference: the WBP Agreement
 21 expressly recites the *absence* of the rights that Plaintiff now claims. There can be no
 22 claim that Defendants intended to interfere with rights that were only asserted after the
 23 purported act of interference and which Defendants were assured did not exist.

24 Third, it is well settled that a claim for interference with contract does not lie
 25 against a party to the contract. Kasparian, 38 Cal. 4th at 262 (“It is obvious that if an
 26 action is brought for interference with contractual relationship by one party to a
 27 contract against another who is also a party to that same contract, the grievance of the
 28

1 plaintiff is, in essence, breach of contract; and, in such a case, plaintiff is entitled to
2 recover all damages flowing from the breach”).

3 Paragraph 17 of the Complaint alleges that WBP expressly covenanted and
4 agreed to faithfully perform the obligations owed to Plaintiff under the 1991 Quitclaim.
5 See also Complaint, ¶ 38 (“WBP’s express covenant and agreement to faithfully
6 perform all terms and conditions of the 1991 Quitclaim was intended to benefit
7 [Plaintiff]”). By this allegation, Plaintiff alleges that Defendants have assumed the 1991
8 Quitclaim, and thus have become parties to it. A party cannot interfere with its own
9 contract. Applied Equip. Corp. v. Litton Saudi Arabia, Ltd., 7 Cal.4th 503, 28 Cal.
10 Rptr. 2d 475 (1994) (only “*a stranger to a contract* may be held liable in tort for
11 intentionally interfering with the performance of the contract) (emphasis in original).

12 The final, but certainly not the least, failing of the interference claim is this:
13 How can the act of *assuming* and agreeing to *faithfully perform* a party's obligations
14 under a contract ever constitute an act of *interference*? If this were the law, every
15 assumption of contractual obligations would be a tort. That is not the law. The policy
16 underlying the tort of contract interference is “protecting the expectations of contracting
17 parties against frustration by outsiders who have no legitimate social or economic
18 interest in the contractual relationship.” Allied Equip. Corp., 7 Cal 4th at 514.
19 Assuming a contract does not violate this policy, and does nothing to interfere with
20 performance – in fact, it has the opposite result of tending to *promote* performance.
21 Assuming a contract, in and of itself, can cause no damage, and results in no disruption
22 of commerce. It cannot be wrongful in the eyes of the law.

23 Plaintiff’s intentional interference claim should be dismissed without leave to
24 amend.


25 **V. CONCLUSION.**

26 For the foregoing reasons, Defendants respectfully request that the Court grant
27 the instant motion and dismiss the First and Second Claims for Relief in Plaintiff’s
28 Complaint. Leave to amend should be denied because any amendment would be an

1 exercise in futility and also subject to dismissal. Speckman v. Hart Brewing, Inc., 143
2 F.3d 1293, 1298 (9th Cir. 1998) (general rule that parties are allowed to amend their
3 pleadings does not extend to cases in which any amendment would be an exercise in
4 futility and where the amended complaint also would be subject to dismissal).

5
6 Dated: April 7, 2008

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