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10 Attorneys for Plaintiff DONALD P.
11 BORCHERS

12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14 DONALD P. BORCHERS,

15 Plaintiff,

16 v.

17 THE WEINSTEIN COMPANY, LLC
18 d/b/a DIMENSION FILMS;
19 MIRAMAX, LLC; THE WALT
20 DISNEY COMPANY; and DOES 1
21 through 50, inclusive,

22 Defendants.

Case No. 2:17-cv-6263

**COMPLAINT FOR DECLARATORY
RELIEF (28 U.S.C. 2201)**

REQUEST FOR JURY TRIAL

COMPLAINT FOR DECLARATORY RELIEF

Plaintiff alleges the following against Defendants and each of them:

Jurisdiction, Venue and The Parties

1. This is an action seeking declaratory relief regarding rights, as alleged below, to a copyrighted work by Stephen King (U.S. Copyright B00000204066, renewed RE000921889). Also involved is the film “Children of the Corn” (U.S. Copyright V2024P222), and certain characters depicted in the film. U.S. Copyright

1 Office, *Compendium of U.S. Copyright Office Practices* 818.4(H) “Characters.”
2 *Christensen v. Harris County* (2000) 529 U.S.576, 587 (re consideration of
3 administrative manuals and similar materials). As alleged herein, the rights in
4 Stephen King’s copyrighted work have been divided and are held by different
5 parties. This action, therefore, seeks relief arising under an Act of Congress
6 relating to copyrights and the authorization of exclusive rights thereunder (17 *USC*
7 101; 106) and is subject to the exclusive jurisdiction of this Court as provided in 28
8 *USC* 1338. In addition, the contracts referenced below place jurisdiction in the
9 State of California and the Federal Courts of California.
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13 2. Declaratory relief is sought pursuant to 28 *USC* 2201, which is
14 available in intellectual property settings. *Medimmune Inc. v. Genetech, Inc.* (2007)
15 549 U.S. 118.
16

17 3. The United States District Court, Central District of California is the
18 proper venue for this action under 28 *USC* 1391 because, as alleged below, a
19 substantial part of the events or omissions giving rise to this action occurred in this
20 judicial district.
21

22 4. Plaintiff Donald P. Borchers (“Borchers”) is a resident of the State of
23 Florida. He is a producer, director, and writer in the entertainment industry.
24

25 5. On information and belief, Defendant Miramax LLC (“Miramax”) is a
26 limited liability company licensed to do business in the State of California,
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1 maintaining its principal place of business in the City of Santa Monica, State of
2 California.

3
4 6. On information and belief, Defendant Walt Disney Company
5 (“Disney”) is a corporation licensed to do business in the City of Burbank, State of
6 California.

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8 7. On information and belief, Defendant The Weinstein Company, LLC
9 (“TWC”), d/b/a/ Dimension Films (“Dimension”) is a business entity organized
10 under the laws of the State of Delaware. Dimension’s principal place of business is
11 in New York, New York. Reference to “Dimension” in this pleading shall include
12 TWC.

13
14 8. Borchers is ignorant of the true names and capacities of those
15 defendants named herein as Does 1 through 50 and therefore sues these defendants
16 by their fictitious names. Borchers will seek leave to amend this Complaint to
17 assert the true names and capacities of said Doe Defendants when, and if, they have
18 been ascertained.

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21 9. On information and belief, each of the Defendants herein, whether
22 individually named or, in the case of Does, collectively named, is the agent,
23 principal, employer, employee, partner, joint-venturer, managing member, officer
24 or director of each other Defendant and in such capacity, was, at all times, acting
25 with full authority of each other Defendant. On further information and belief, each
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1 of the Defendants named herein authorized and/or ratified the acts of each other
2 Defendant.

3 4 **Terms of Art**

5 10. In this Complaint, three terms of art are used, namely “Remake,”
6 “Sequel” and “Spin-off”. The following provides an analysis of these terms.
7

8 11. **Remake:** A motion picture Remake is a film “...that is based on an
9 earlier work and tells the same story...” *Wikipedia*.¹ *FRE* Rule 803 (18)(A).
10 Essentially, it is a re-telling of the original story. When a remake is anticipated to
11 spawn sequels it is called a “Reboot.” Remake is used when the film is to be a
12 “stand-alone” or “one-off.” *AN AFFAIR TO REMEMBER*, a 1957 American
13 romance film, was a remake of the 1939 film, *LOVE AFFAIR*. *Wikipedia*.²
14

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16 12. **Spin-off:** A motion picture Spin-off is a motion picture “...derived
17 from one or more already existing works, that ... focuses [on] a substantial change
18 in narrative viewpoint and activity from that (previous) storyline ... and **is a shift to**
19 **that action and overall narrative thread of some other protagonist(s)**, which
20 now becomes the central or main thread (storyline) of the new sub-series...”
21 *Wikipedia*.³ (emphasis added). A Spin-off follows the original story in a different
22 way, typically developing the story of one of the co-starring or ancillary characters.
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27 ¹see Exhibit, “A”, <https://en.wikipedia.org/wiki/Remake>. Page 32 (Arabic numbers cite to consecutive
page of this document where the Exhibit is found).

28 ²see Exhibit, “B”, https://en.wikipedia.org/wiki/An_Affair_to_Remember. Page 36

³see Exhibit, “C”, [https://en.wikipedia.org/wiki/Spin-off_\(media\)](https://en.wikipedia.org/wiki/Spin-off_(media)). Page 40

1 13. **Sequel:** And, a motion picture sequel is a film “...that continues the
2 story of, or expands upon, some earlier work...” *Wikipedia*.⁴ It is a continuation of
3 the original story. When a Sequel continues the prior story it is called a Pre-quel.
4 Sequel rights typically include Pre-quel rights.
5

6 **Remakes and Spin-offs Are Two Different Things**
7

8 14. “THE MATRIX reboot is not a remake or reboot, according to
9 screenwriter Zac Penn – who alludes to a spin-off.” *Daily Express*, March 17,
10 2017.⁵ and, “While original reports claimed 'The Matrix' was being rebooted, writer
11 Zak Penn took to Twitter Friday to clarify he's instead working on a spinoff project
12 set within the Matrix universe.” *Digital Trends* , March 17, 2017.⁶ FRE Rule
13 803(18)(A).
14

15 **Sequels and Spin-Offs Are Two Different Things**
16

17 15. A spin-off, not a sequel, to SUICIDE SQUAD is in the works, “... Warner
18 Bros. has been developing a spinoff with the help of Robbie ...” *The Hollywood*
19 *Reporter*, August 9, 2016⁷. FRE Rule 803(18)(A) and, “WE'LL GET MORE
20 MARGOT ROBBIE AS WARNER BROS. AND DC DEVELOP 'HARLEY
21 QUINN VS. THE JOKER' SPINOFF” *Maxim*, July 23, 2017.⁸ FRE Rule
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26 ⁴ see Exhibit, “D”, <https://en.wikipedia.org/wiki/Sequel> Page 54

27 ⁵ see Exhibit, “E” Page 62

28 ⁶ see Exhibit, “F” Page 65

⁷ see Exhibit, “G” Page 68

⁸ see Exhibit, “H” Page 70

1 803(18)(A). And, "... the yet-to-be-confirmed project seems to be in addition to
2 Suicide Squad 2 ..." *The Express Tribune*, July 24, 2017⁹ which, again,
3 differentiates the Suicide Squad 2 sequel from the Harley Quinn spin-off, which
4 spins off the character, Harley Quinn. *FRE* Rule 803(18)(A).
5

6 16. CREED is a Spin-off of ROCKY, not a sequel, "...director Ryan Coogler
7 says he never imagined setting his "Rocky" spin-off anywhere but Philadelphia, the
8 location of the original "Rocky" movie and its five sequels..." *The Morning Call*,
9 August 7, 2017¹⁰. *FRE* Rule 803(18)(A) and, "Based on characters created by
10 Sylvester Stallone 40 years ago, Coogler's story was ultimately approved by
11 Stallone himself, but getting that green light wasn't easy. "I was dead set against
12 it," Stallone revealed of his initial reaction to the notion of a spinoff film." *Total*
13 *Rocky*, November 3, 2015¹¹ *FRE* Rule 803(18)(A) and, "A new screenplay titled
14 "Drago" was filed with the copyright office, based on Sylvester Stallone's popular
15 Rocky IV character, Ivan Drago, played by actor Dolph Lundgren in the 1985
16 Rocky movie." *Total Rocky*, November 3, 2015¹² This spin-off follows the
17 character, Drago.
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22 17. THE TRANSFORMERS has spawned both sequels and spin-offs.
23 "...Paramount has planned at least 14 sequels and spin-off movies... one of the
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25

26 _____
27 ⁹ see Exhibit, "I" Page 71

28 ¹⁰ see Exhibit, "J" Page 73

¹¹ see Exhibit, "K" Page 79

¹² see Exhibit, "L" Page 88

1 Transformers spin-off movies to take place in Ancient Rome... (while) The fifth
2 movie in the Transformers franchise expands the mythology of the world, revealing
3 that Autobots and Decepticons have been interfering in human history since
4 medieval England, appearing again in World War II, and presumably other time
5 periods as well...” *Slash Film*, June 14, 2017¹³ FRE Rule 803(18)(A) and, “...John
6 Cena has nabbed a lead role in the Transformers spinoff Bumblebee...” *The*
7 *Hollywood Reporter*, July 31, 2017¹⁴ FRE Rule 803(18)(A). Discussions of non-
8 starring character spin-offs abound, “...A common complaint about the
9 Transformers movies is that the robots take a backseat to the humans. Sam
10 Witwicky, Cade Yeager—these are the main characters of the Transformers
11 movies, not Optimus Prime and Megatron. You might think a spinoff film focusing
12 on one specific Transformer could change that. But don’t hold your breath. The
13 Hollywood Reporter is reporting that Hailee Steinfeld is in talks to star in the 2018
14 Bumblebee Transformers spin-off, from *Kubo and the Two Strings* director Travis
15 Knight. She’ll play “a tomboy who also holds a job as a mechanic after school,”...”
16 *Gozmodo io9*, May 31, 2017¹⁵. FRE Rule 803(18)(A). And that is why this is a
17 spin-off in the TRANSFORMERS series, and not a sequel, because it follows an
18 ancillary character, not the main story, itself.

27 ¹³ see Exhibit, “M” Page 93

28 ¹⁴ see Exhibit, “N” Page 94

¹⁵ see Exhibit, “O” Page 96

1 18. Michael Douglas' ex-wife, Diandra who is entitled to share future Spin-
2 off income with Michael, brought suit against Michael for her share of WALL
3 STREET 2. Michael's defense was that WALL STREET 2 was a Sequel and not a
4 Spin-off, and Diandra was not entitled to Sequel money. "... Sequels, (his lawyer,
5 Marilyn) Chinitz said, are not spinoffs, and Diandra has no right to any money from
6 a sequel. "They're not the same thing," she said... **Justice Cooper indicated that**
7 **he thought there was a difference between a spinoff and a sequel as well...**
8 *New York Post*, June 28, 2010¹⁶ (emphasis added). *FRE* Rule 803(18)(A).

12 **Remakes and Sequels Are Two Different Things.**

13 19. This is, perhaps, best illustrated by the well-known movie, KING
14 KONG. "King Kong is a giant movie monster, resembling a giant ape, that has
15 appeared in various media since 1933. The character first appeared in the 1933 film
16 King Kong from RKO Pictures, which received universal acclaim upon its initial
17 release and re-releases. A sequel quickly followed that same year with Son of
18 Kong, featuring a Little Kong. In the 1960s, Toho produced King Kong vs.
19 Godzilla (1962), pitting a much larger Kong against Toho's own Godzilla, and King
20 Kong Escapes (1967), based on The King Kong Show (1966–1969) from
21 Rankin/Bass Productions. In 1976, Dino De Laurent is produced a modern remake
22 of the original film directed by John Guillermin. A sequel, King Kong Lives,
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28 ¹⁶ see Exhibit, "P" Page 98

1 followed a decade later featuring a Lady Kong. Another remake of the original, this
2 time set in 1933, was released in 2005 from filmmaker Peter Jackson.” *Variety*,
3 February 8, 2017. *Wikipedia*.¹⁷ FRE Rule 803(18)(A).
4

5 **Sequels Continue a Franchise, Spin-Offs Expand a Franchise.**

6 20. After Disney purchased LucasFilm in October, 2012, Forbes reported,
7
8 “The Mouse House has already scheduled a seventh film in the Star Wars saga to be
9 directed by J.J. Abrams and scheduled to hit theaters in 2015. Now comes reports
10 that Disney will begin exploiting the broader Star Wars universe with spin-off
11 movies featuring Han Solo and Boba Fett.” *Forbes*, February 6, 2013.¹⁸ There are 9
12 films in the Star Wars Franchise: an original, 5 Sequels and 3 prequels. The spin-
13 offs follow a co-starring character, Han Solo and an ancillary character, Boba Fett.
14 A distinction is made from sequels when referring to this film, a spin-off and not a
15 sequel, “... actress Phoebe Waller-Bridge is in talks for a key role in the upcoming
16 “Star Wars” Han Solo spinoff starring Alden Ehrenreich ...” *Variety*, February 8,
17 2017,¹⁹ and, “... ‘Star Wars’ Han Solo Spinoff: Lord & Miller Fired After Clashing
18 With Kathleen Kennedy ...” *Variety*, June 20, 2017²⁰ and, “... Star Wars: Episode
19 VII will launch a new trilogy next year, with Star Wars: Episode VIII following in
20 2017 and Star Wars: Episode IX coming in 2019. LucasFilm is also planning an
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27 ¹⁷ see Exhibit, “Q” https://en.wikipedia.org/wiki/King_Kong Page 101

28 ¹⁸ see Exhibit, “R” Page 106

¹⁹ see Exhibit, “S” Page 108

²⁰ see Exhibit, “T” Page 110

1 Untitled Star Wars Han Solo Spin-Off and Untitled Star Wars Boba Fett Spin-Off
2 to debut in 2016 and 2018 ...” *Movieweb*, January 17, 2014²¹ FRE Rule
3 803(18)(A)(3) and, “... And, big news "Star Wars" fans: Disney, which announced
4 it would buy LucasFilm last year, plans to make spinoff movies based on characters
5 in addition to the three sequels it had previously announced ...” *CNBC*, February
6 5, 2013²² FRE Rule 803(18)(A). The point is illustrated clearly here that spin-offs
7 are based on characters. FRE Rule 18(A)(3).
8

9
10 21. “...Lionsgate has won a bidding war to pick up a female- centric spec
11 action script titled *Ballerina* that will serve as a platform for a possible John Wick
12 spinoff... Lionsgate is relishing the idea of a franchise expansion...” *The Hollywood*
13 *Reporter*, July 25, 2017.²³ FRE Rule 18(A)(3).
14

15
16 22. “...The *Conjuring* franchise continues to expand, with New Line
17 Cinema getting to work on a *Conjuring 2* spinoff based around the character of the
18 *Crooked Man*... The *Crooked Man* made his first appearance in *The Conjuring 2*
19 (the sequel to *The Conjuring*)... The *Crooked Man*, the next chapter in this growing
20 universe... The next spinoff from the main film series will be *The Nun*...” *The*
21 *Hollywood Reporter*, June 14, 2017.²⁴ FRE Rule 18(A)(3).
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27 ²¹ see Exhibit, “U” Page 116

28 ²² see Exhibit, “V” Page 114

²³ see Exhibit, “W” Page 118

²⁴ see Exhibit, “X” Page 121

1 23. For Lionsgate, the sequels to DIVERGENT have stopped performing,
2 so they are expanding their franchise with a TV spin-off, "...Lionsgate has opted to
3 skip theaters for the planned finale, The Divergent Series: Ascendant. Instead, the
4 dystopian YA saga will conclude with a TV movie that will then launch a
5 standalone spinoff TV series..." *Slash Film*, July 20, 2016.²⁵ FRE Rule 18(A)(3).
6
7

8 Chain of Title to "Children of the Corn"

9 24. On information and belief, in 1977, Stephen King copyrighted a
10 novella named "Children of the Corn" ("the Novella") (U.S. Copyright
11 B00000204066; RE 0000921899).
12

13 25. On information and belief, in or about August 1983, a company known
14 as New World Pictures acquired the motion picture and allied rights to the Novella
15 other than certain literary rights retained by Steven King.
16

17 26. In 1984, New World produced and distributed a feature film based on
18 the Novella (herein "the Original Film") (U.S. Copyright V2024P222).
19

20 27. On November 28, 1989, New World granted to a company known as
21 Oceana Distributors L.P. ("Oceana") all of New World's right, title, and interest in
22 and to New World's film library ("the Library"), which included the Original Film,
23 but New World retained U.S. television distribution rights to the Library and
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²⁵ See Exhibit "Y" Page 124

1 television remake, sequel and spin-off rights. In 1997 Fox Television merged with
2 New World, thus making Fox TV the successor to the rights held by New World.

3
4 28. Oceana became Trans Atlantic Distributors, L.P. (“Trans Atlantic”),
5 and by a series of transactions that concluded in 1991, Park Avenue Entertainment
6 (“Park Avenue”) became the assignee of Oceana/Trans Atlantic’s rights in the
7 Original Film itself, not the entire Library, namely, the right to produce remakes,
8 sequels, spin-offs, merchandising, and the like.

9
10 29. In 1994 Park Avenue entered into an agreement with Miramax, at the
11 time a division of Disney, concerning the Original Film only, permitting Miramax
12 the right to make only sequels or remakes of the Original Film, a copy of which is
13 attached hereto as Exhibit Z and incorporated herein by this reference (“the 1994
14 Agreement” – 127, etc.)²⁶. In the 1994 Agreement, Park Avenue did not transfer
15 the distribution rights held by Oceana/Trans Atlantic to the Original Film. In the
16 1994 Agreement, Park Avenue expressly retained for itself all rights to the first
17 sequel (previously made) and second sequel (on information and belief, not yet then
18 released) to the Original Film (collectively, the “Park Avenue Sequels”). In the
19 1994 Agreement, Park Avenue expressly retained for itself any elements of the
20 Original Film or any of the Park Avenue Sequels, including specifically the
21 “characters portrayed therein or the title thereof” (See Exhibit Z, the 1994
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28 ²⁶ Arabic numbers following references to Exhibits Z, AA, and BB are to the consecutively numbered pages of this Complaint, not the internal numbers of the exhibits themselves.

1 Agreement, paragraph 1.f. – page 127). This is a document pertaining to copyright.
2 37 C.F.R. 201.4(a)(2).
3

4 30. In 2005 Park Avenue entered into an agreement with Miramax, at the
5 time a division of Disney, regarding the Original Film (“the 2005 Agreement”), a
6 copy of which is attached hereto as Exhibit A and incorporated herein by reference.
7
8 In the 2005 Agreement, Miramax acquired only the remake rights to the Original
9 Film (and ancillary rights associated therewith). Exhibit A, paragraph 1. This is a
10 document pertaining to copyright. 37 C.F.R. 201.4(a)(2).
11

12 31. As a result of these transactions, the rights associated with the Novella
13 had been divided into five pieces.

14 a. One piece belonged to Stephen King (literary rights).
15

16 b. One piece was distribution of the Original Film (but not on US
17 TV).
18

19 c. One piece was Fox Television’s right to US TV distribution of
20 the Original Film as well as TV remakes, sequels and spinoffs, and in fact
21 Borchers produced a television remake of the Original Film for Fox Television
22 that was aired in 2009 with no objection.
23

24 d. One piece was Disney/Miramax’s non-TV remake rights that
25 was derived from the 2005 Agreement.
26

27 e. One piece was Park Avenue’s right to everything else, including
28 sequels, spinoffs, graphic novel, merchandising, video games, etc.

1 32. Later in 2005 Bob Weinstein & Harvey Weinstein, acquired the label
2 “Dimension Films” and left Miramax (which continued as a division of Disney).
3
4 They formed TWC.

5 33. On information and belief, through its acquisition of Dimension, TWC
6 obtained from Disney an option only for those rights obtained by Miramax under
7
8 the 2005 Agreement.

9 34. Disney remained a participant in future/ongoing productions by either
10 Miramax or TWC.

11
12 35. In November 2016, Graphic Novel Enterprises (“Graphic Novel”)
13 purchased all of Park Avenue’s right, title, and interest, in and to the Original Film.
14 (See paragraph 29e. above.)

15
16 36. On July 27, 2017, Borchers acquired all of the rights that Graphic
17 Novel obtained from Park Avenue.

18
19 **Why Plaintiff Needs Declaratory Relief**

20 37. A dispute has arisen between and among Borchers and Defendants
21 regarding the ownership of the right to produce remakes, sequels and spin-offs of
22 the Original Film. Borchers contends that Graphic Novel purchased these rights
23 from Park Avenue, and he, in turn, obtained these rights from Graphic Novel.

24
25 38. In support, Borchers provides the following:

26 a. That Defendants’ right, under the 2005 Agreement, to make any
27
28 version of the Original Film is limited to one such film, and once that version

1 is made, Borchers, and not the Defendants, has the right to remake the Original
2 Film (Exhibit AA, first paragraph --- page 146).

3
4 b. In addition and alternatively, after the sixth sequel of the
5 original film was produced in 2001, there was never an assignment of sequel
6 rights to the Defendants for the Original Film, and Borchers, not the
7 Defendants, has the right to make sequels; and,

8
9 c. In addition and alternatively, that the rights to make spin-offs of
10 the Original Film were expressly reserved by Park Avenue, and Borchers, not
11 the Defendants, has the right to make spin-offs (Exhibit Z, paragraph 1.f. --
12 127).

13
14 39. Borchers has asked Defendants to admit that he is the owner of these
15 rights to the Original Film, but they have either refused to do so or have disputed
16 his claims, affirmatively asserting “adverse legal interests”. Hence, Defendants
17 have placed Borchers in the position of having to choose between engaging in
18 arguably infringing activity (producing a film) or abandoning his right to exploit his
19 rights. This has created an actual and substantial controversy between Borchers and
20 Defendants *SanDisk Corp. v. STMicroelectronics, Inc.* (Fed.Cir. 2007) 480 F.3d
21 1372; *IMS Healty, Inc. v. Vality Tch, Inc.* (E.D. Pa. 1999) 59 F.Supp.2d 454
22 (declaratory judgment in copyright context).

23
24 40. Borchers produced both the Original Film in 1984 and a TV remake in
25 2009 --- which was for Fox TV, one of the holders of the five rights alleged in
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1 paragraph 29. c. above --- and intends to produce further films based on the
2 Original Film, including a spec script that he has written as a spin-off of the
3 Original Film.
4

5 41. Absent this Court's declaration of Borchers' rights, and a resolution of
6 legal uncertainties, he cannot submit any production, or even his spec script, for
7 Copyright registration without concern for engaging in a potentially unlawful use or
8 facing criminal liability. 17 USC 103(a); 17 USC 506(e). And, if Borchers is able
9 to produce, because the Defendants have denied, or refused to acknowledge, his
10 rights, Borchers faces a potential infringement action by the Defendants. See
11 *Medimmune, Inc. v. Genentech, Inc.* (2007) 549 U.S. 118, fn. 11.
12
13

14 **FIRST CAUSE OF ACTION --- REMAKE RIGHTS**

15
16 42. Borchers incorporates herein paragraphs 1 through 41 above.

17 43. As alleged above, as and for a first alternative cause of action for
18 declaratory relief, Borchers contends that the Defendants' right, under the 2005
19 Agreement, to make any version of the Original Film is limited to one such film, a
20 contention which Defendants have disputed or with which they have refused to
21 agree.
22

23
24 44. In support, Borchers provides the following:

25 a. In the 1994 Agreement, the "factual recitals" reference "certain
26 remake and sequel rights" owned by Park Avenue and further reference
27 Miramax's wish to acquire the "right to make future sequels" (Exhibit Z, page
28

1 127). Opposing the “plural” aspect of the 1994 Agreement (i.e. “future
2 sequels”), the first paragraph of the 2005 Agreement (Exhibit AA, page 146)
3 confirms that Miramax was obtaining rights in connection with Miramax’s
4 “development and possible production of a (single) motion picture” not
5 “development and possible production of (multiple) motion pictures.” The
6 factual recitals are conclusively presumed to be binding between the parties or
7 their successors in interest. *FRE* Rule 301, 302. *Cal. Evid. Code* 622. *Plaza*
8 *Freeway Limited Partnership v. First Mountain Bank* (2000) 81 Cal.App.4th,
9 616. Further, where, as here, there are several contracts relating to the same
10 matters between the same parties they are viewed together. *Cal.Civ.Code*
11 1642. *Midori Kondo v. Anthelio Healthcare* (2015) 2015 WL 7710301;
12 *Pellegrini v Weiss* (2008) 165 Cal.App.4th 515, 534.

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17 b. As alleged above, the 2005 Agreement (Exhibit AA, page 146)
18 unambiguously provides Defendants only a one picture license, “...
19 Company’s purchase of all rights (as defined herein below) ... in connection
20 with company’s development and production of a [singular, not plural] motion
21 picture.” The language of a contract is to govern its interpretation if the
22 language is clear and explicit and does not involve absurdity. *Cal.Civ.Code*
23 1638. *F.B.T. Productions v. Aftermath Records* (2010) 621 F3d 958. There
24 need to be nothing else considered other than the writing. *Cal.Civ.Code* 1639.
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c. The whole of a contract is to be taken together. *Cal.Civ.Code* 1641. *Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10Cal.App.5th. Other provisions of the 2005 Agreement consistently refer to a single, not multiple, motion picture:

(1) Paragraph 2 specifies a production bonus applicable to “the Picture,” not “Pictures” (Exhibit AA, page 146/147).

(2) Paragraph 2 specifies the formulae for calculating the production bonus for “the Picture”, not “Pictures” (Exhibit AA, page 146/147)

(3) Paragraph 3 specifies Box Office Bonuses for “the Picture”, not “Pictures” (Exhibit AA, page 147).

(4) Paragraph 5.B specifies, in relevant part, “... Company agrees to indemnify Owner from and against any losses, liabilities, costs, damages or expenses ... incurred from Company’s development, production, distribution advertising or exploitation of the Picture...” , not “Pictures.” (Exhibit AA, page 148). Had the 2005 Agreement involved multiple pictures, multiple indemnifications would have been provided but they were not. *Cal.Civ.Code* 1644, 1645.

(5) The 2005 Agreement was drafted by Miramax, not Park Avenue (Exhibit AA, page 146), hence even if there were an ambiguity or uncertainty in the language of that agreement (there is none), it must be interpreted against

1 Miramax and its successors, and not against Borchers who now is a successor
2 in interest to Park Avenue. *Cal.Civ.Code* 1654.

3
4 (6) Nowhere does the 2005 Agreement mention or refer to anything
5 other than “the Picture.” *Cal.Civ.Code* 1641. *Cachil Dehe Band of Wintun*
6 *Induans v. California* (2009) 629 F.Supp.2d 1091.

7
8 (7) If there were an intent to create a multi-picture license in the
9 2005 Agreement, that Agreement would have so stated. For example, the
10 indemnity provision would have so stated and the first paragraph would have
11 so stated. A court cannot revise agreements under the guise of construing
12 them. *Hinckley v. Bechtel Corp.* (1974) 41 Cal.App.3d 206, 210, and pursuant
13 to *Cal.C.C.P.* 1858 “the office of the Judge is ... not to insert what has been
14 omitted”. *Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 753.
15 “The court ... cannot insert in the contract language which one of
16 the parties now wishes were there.” *Series AGI v. Eves* (2013) 217 Cal. App.
17 4th 156, 164.

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20
21 (8) Paragraph 9 (Exhibit AA, page 149) specifies, in relevant part,
22 “... All of the principal deal terms which close this Agreement are those terms
23 stated herein,” meaning that there are no oral agreements. Hence the 2005
24 Agreement is integrated and cannot be varied, altered or contradicted by prior
25 oral declarations. Restatement Second of Contracts Section 210(1) or ancillary
26
27
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1 agreements. *Cal.Civ.Code* 1625. *Cal.C.C.P.* 1856. *Julius Castle Restaurant*
2 *v. Payne* (2013) 216 Cal.App.4th 1423.

3
4 d. In 2011, pursuant to the 2005 Agreement, Dimension produced and
5 distributed the Picture.

6 45. Absent this Court's declaration of Borchers' rights, and a resolution of
7 legal uncertainties, he cannot submit any production, or even his spec script, for
8 Copyright registration without concern for engaging in a potentially unlawful use or
9 facing criminal liability. 17 USC 103(a); 17 USC 506(e). And, if Borchers is able
10 to produce, because the Defendants have denied, or refused to acknowledge, his
11 rights, Borchers faces a potential infringement action by the Defendants. See
12 *Medimmune, Inc. v. Genentech, Inc.* (2007) 549 U.S. 118, fn. 11.

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16 **SECOND CAUSE OF ACTION --- SEQUEL**

17 46. Borchers incorporates herein paragraphs 1 through 45 above.

18 47. As alleged above, as and for an additional second alternative cause of
19 action for declaratory relief, Borchers contends that after the production and
20 distribution of a sixth sequel in 2001, there was never an assignment of sequel
21 rights to the Defendants for the Original Film, a contention which Defendants have
22 disputed or with which they have declined to agree.

23
24 48. In support, Borchers provides the following:

25 a. Subsequent to the sixth sequel in 2001, there was never an
26 assignment of sequel rights from Park Avenue to the Defendants, thus showing
27
28

1 how the parties treated those rights because their conduct is the most reliable
2 evidence of their intention. *Kennecott Corp. v. Union Oil Co.* (1987) 196
3 Cal.App.3d 119.
4

5 b. In 1994, Miramax followed a business practice that differed
6 significantly from industry norms. Rather than spend a larger sum of money
7 upfront to acquire all derivative rights in the Original Picture, in 1994
8 Miramax chose to spend a smaller sum and acquired only the right to make
9 one remake or sequel and was provided the conditional right to acquire the
10 rights to future remakes or sequels based on the Original Film (“the Future
11 Productions”). On information and belief, in 2001, Miramax satisfied the
12 conditions; however, Miramax did not take steps to acquire the Future
13 Productions. After releasing the sixth sequel in 2001, Miramax abandoned
14 making installments of the Original Film. On November 18, 2004 Borchers
15 called Elliot Slutzky, then head of distribution for Miramax, and informed him
16 that Borchers had just written a spec remake of the Original Film. Elliot
17 Slutzky stated that Miramax had abandoned the franchise because of declining
18 sales (it was no longer theatrically viable and the home video market was
19 getting too tough), the franchise had wound down, and he was not interested in
20 trying to exploit any Future Productions. But after Borchers explained his
21 agenda to re-boot the franchise with a remake instead of extending the current
22 series with an additional entry, Elliot Slutzky knew of the state of horror
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1 remakes²⁷, saw the difference, and subsequently agreed to talk to Bob
2 Weinstein about joining that wagon train. Responsively, later on the same day,
3 November 18, 2004, Josh Greenstein Bob Weinstein's assistant contacted
4 Borchers and confirmed that Miramax was not interested in continuing the
5 current franchise, but that Miramax was most interested in the idea of
6 rebooting the franchise with a remake. Josh Greenstein told Borchers that
7 Andrew Rona, a production executive with Miramax, would reach out to
8 him. During November and December 2004 and January and February 2005,
9 Borchers followed up with a few calls and left messages with Josh Greenstein
10 and Andrew Rona. Knowing that Borchers was interested in producing a
11 remake of the Original Film, and agreeing with Borchers that a remake was
12 worthwhile, on information and belief, Miramax discovered that the right to
13 remake the Original Film had not been acquired from Park Avenue pursuant to
14 paragraph 5 of the 1994 Agreement. On information and belief, according to
15 Chuck Shepard, counsel for Dimension, Park Avenue disputed that the 1994
16 Agreement automatically transferred remake rights to Miramax. Hence,
17 without telling Borchers, Miramax commenced negotiations with Park
18 Avenue. On February 11, 2005, Miramax successfully completed the
19 negotiation by closing its purchase of the (executory) remake rights from Park
20 Avenue. On February 11, 2005, Miramax successfully completed the
21 negotiation by closing its purchase of the (executory) remake rights from Park
22 Avenue. On February 11, 2005, Miramax successfully completed the
23 negotiation by closing its purchase of the (executory) remake rights from Park
24 Avenue. On February 11, 2005, Miramax successfully completed the
25 negotiation by closing its purchase of the (executory) remake rights from Park
26 Avenue.

27 ²⁷ The Ring (2002), Carrie (2002), The Texas Chainsaw Massacre (2003), Willard (2003), Dawn of the
28 Dead (2004), The Amityville Horror (2005), The Cabinet of Dr. Caligari (2005), Dark Water (2005), The
Fog (2005)

1 Avenue, pursuant to the right to acquire Future Productions as provided in the
2 1994 Agreement. *Southern California Edison v. Superior Court* (1995) 37
3 Cal.App.4th 839, 551.
4

5 c. The 2005 Agreement (Exhibit AA, page 149), thus, is evidence
6 that the 1994 Agreement (Exhibit Z, page 126) remained executory, and that
7 further steps (the 2005 Agreement) were therefore needed for Miramax to
8 obtain further rights. But in taking those steps and entering into the 2005
9 Agreement (Exhibit AA, page 149), Miramax chose not to acquire sequel
10 rights and continued to abandon them: the 1994 Agreement (Exhibit Z, page
11 126) is fully integrated (the entire understanding of the parties with no other
12 written or oral understandings), and Miramax's conduct further demonstrated
13 that it had the right to, and was acquiring, only one film, opting for a
14 "remake." *Restatement Second of Contracts* Section 210(1) . *Cal.Civ.Code*
15 1625. *Cal.C.C.P.* 1856. *Kennecott*, supra. *Crestview*, supra. Further, a court
16 cannot **rewrite** a contract to relieve a party from what he now contends may be
17 a "bad deal" or to give him a better deal than he negotiated. *Naify v. Pacific*
18 *Indemnity Co.* (1938) 11 Cal.2d 5, 11.
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23

24 d. Paragraph 9 of the 2005 Agreement (Exhibit AA, page 149)
25 states, in relevant part: the 1994 Agreement (Exhibit Z, page 126) defined
26 "Rights" to include both remake and sequels if a transfer of rights occurred
27 pursuant to paragraph 5 of that Agreement; the 2005 Agreement, intentionally
28

1 redefined “Rights” to include only remake; the 2005 Agreement contains no
2 mention of sequel rights – which remained with Park Avenue; the 1994
3 Agreement specifically withholds from Miramax each and every right not
4 granted therein; the 2005 Agreement specifically withholds from Miramax
5 each and every right not granted therein; the 1994 Agreement provides a
6 choice for either remake **or** sequel, not a choice for both remake **and** sequel; in
7 the 2005 Agreement, Miramax **chose** to acquire remake, not sequel, rights; the
8 assignment of rights contemplated under paragraph 5 of the 1994 Agreement
9 was not self-executing, , using “future tense” verbs such as “shall,” and
10 requiring Miramax to **make a choice** between remake or sequel; consideration
11 was paid by Miramax to acquire remake rights only via the 2005 Agreement;
12 no consideration was paid by Miramax via the 2005 Agreement or via any
13 other agreement to acquire any other rights; the 1994 Agreement, paragraph 5
14 (Exhibit Z, page 130), states, in pertinent part, “Seller agrees to execute and
15 deliver a short form assignment in substantially the form as Exhibit “A”
16 (Exhibit Z, page 144) evidencing the grant of the Rights with respect to all
17 future remakes or sequels based on the Original Picture in 2010, Defendants
18 caused to be filed with the United States Copyright Office a Short Form
19 Assignment of rights to remake the Original Film, but since 2001, Defendants
20 have caused no other such filings, including a filing for sequels. *Cemetery,*
21 *supra; Kennecott, supra;* “The court ... cannot insert in the contract language
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1 which one of the parties now wishes were there.” *Series AGI v. Eves* (2013)
2 217 Cal. App. 4th 156, 164.

3
4 48. Absent this Court’s declaration of Borchers’ rights, and a resolution of
5 legal uncertainties, he cannot submit any production for Copyright registration
6 without concern for engaging in a potentially unlawful use or facing criminal
7 liability. 17 USC 103(a); 17 USC 506(e). And, if Borchers is able to produce,
8 because the Defendants have denied, or refused to acknowledge, his rights,
9 Borchers faces a potential infringement action by the Defendants. See *Medimmune,*
10 *Inc. v. Genentech, Inc.* (2007) 549 U.S. 118, fn. 11.

11
12
13 **THIRD CAUSE OF ACTION --- SPIN-OFF**

14 49. Borchers incorporates paragraph 1 through 48 above.

15
16 50. As alleged above, as and for an additional third alternative cause of
17 action for declaratory relief, Borchers contends that the rights to make spin-offs of
18 the Original Film were expressly reserved by Park Avenue, and Borchers, not the
19 Defendants, has the right to make spin-offs of the Original Film, a contention which
20 Defendants have disputed or with which they have declined to agree.

21
22 51. In support of his contention, Borchers provides the following:

23
24 a. As alleged above, a motion picture sequel is a motion picture
25 that continues the story or expands upon some earlier work. Also as alleged
26 above, a motion picture spin-off is a motion picture that focuses on a change in
27 narrative viewpoint and activity from the previous storyline and shifts to that
28

1 action and overall narrative thread of some other character, which now
2 becomes the central or main thread storyline of the new spin-off. In other
3 words, spin-offs tell the story of a character, who is not the original
4 protagonist, making this secondary character the new protagonist in the new
5 derivative motion picture. *Cal.Civ.Code* 1645.
6

7
8 b. The 1994 Agreement explicitly retained spin-off
9 rights. Paragraph 6, captioned, “Reservation of Rights,” states, “Seller
10 reserves all rights not specifically granted to Purchaser hereunder. Purchaser
11 acknowledges that the Rights do not include ... without limitation, the
12 characters portrayed therein ..., ” to wit: spin-offs (Exhibit Z, page 131). This
13 is reiterated in the Short Form Assignment attached to the 1994 Agreement
14 (Exhibit Z, page 144), and there is no grant of rights of additional kind of any
15 kind after the 1994 Agreement with the exception of the remake right provided
16 in the 2005 Agreement.
17

18
19 c. Paragraph 5 of the 1994 Agreement states, in relevant part, “...
20 provided, however, that the foregoing shall not be construed to limit or restrict
21 the reservation of rights by Seller...” (emphasis added) (Exhibit Z, page 130)
22 To wit, the grant of rights could not possibly transfer spin-off rights, which are
23 different from “sequels”, something admitted by Lawrence Kuppin, the owner
24 of Park Avenue, in a letter to Borchers’ attorney written seven years ago on
25
26
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1 October 4, 2010.²⁸ [note: as with the 1994 Agreement and the 205
2 Agreement, this is a document pertaining to copyright. 37 C.F.R. 201.4(a)(2)].
3
4 See *Cal.Civil.Code* 1646 (contract extends only to those things concerning
5 which it appears that the parties intended to contract).

6 d. In 2016 Borchers wrote a spec spin-off script based on themes
7 and a character from the Original Movie and set out looking for the rights
8 holder in order to purchase “spin-off” rights for a production.

9
10 e. At the time, Dimension was holding itself out to be the owner of
11 the spin-off rights.

12
13 f. On May 3, 2016. Borchers met with Matt Signer, head of
14 production at Dimension and asked Signer to confirm that Dimension had the
15 spin-off rights because Borchers wanted to acquire a license to make his spin-
16 off.

17
18 g. Signer was unable to confirm Dimension’s rights, so through his
19 lawyer, Borchers followed up with Sarah Sobel, the head of business affairs
20 for Dimension. On June 16, 2016, Sobel refused to confirm Dimension’s
21 rights.
22

23
24 h. Unable to confirm that Dimension had spin-off rights, Borchers
25 conducted extensive research and determined that the rights had never been
26 transferred away by Park Avenue (see 1994 Agreement, Exhibit Z page 127
27

28

²⁸ See Exhibit CC.

1 and the 2010 Kuppin Letter, Exhibit BB page 152), and Borchers eventually
2 obtained them by way of a transfer from Park Avenue to Graphic Novel to
3 Borchers as set forth above.
4

5 i. In or about April 2017, through his counsel Borchers again
6 contacted Dimension and told Dimension that Borchers was now asserting
7 ownership of the spin-off rights. Dimension immediately disputed Borchers'
8 claim of ownership.
9

10 j. On or about June 19, 2017, Borchers contacted Miramax and
11 was eventually advised that Miramax would not confirm the status of the
12 spin-off rights, if any.
13

14 57. Judicial intervention is necessary to resolve this dispute so that Borchers'
15 rights are protected. Therefore, Borchers seeks a judicial determination to resolve
16 the issue of the ownership of spin-off rights to the Original Picture. Absent this
17 Court's declaration of Borchers' rights, and a resolution of legal uncertainties, he
18 cannot submit any production, including a spin-off, for Copyright registration
19 without concern for engaging in a potentially unlawful use or facing criminal
20 liability. 17 USC 103(a); 17 USC 506(e). And, if Borchers is able to produce,
21 because the Defendants have denied, or refused to acknowledge, his rights,
22 Borchers faces a potential infringement action by the Defendants. See *Medimmune,*
23 *Inc. v. Genentech, Inc.* (2007) 549 U.S. 118, fn. 11.
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1 **WHEREFORE, Plaintiffs pray for judgment from this Court against**
2 **Defendants and in Plaintiff’s favor as follows:**

3 **A. On the First Cause of Action:** For a judicial declaration that
4 Defendants’ right, under the 2005 Agreement, to make any version of the Original
5 Film is limited to one such film and that Borchers, and not the Defendants, has the
6 right to remake the Original Film.
7

8 **B. On the Second Cause of Action:** For a judicial declaration that after
9 the production and distribution of a sixth sequel in 2001, there was never an
10 assignment of sequel rights to the Defendants for the Original Film, such that
11 Borchers, and not the Defendants, has the right to make sequels of the Original
12 Film.
13

14 **C. On the Third Cause of Action:** For a judicial declaration that
15 Borchers, not the Defendants, has the right to make spin-offs of the Original Film.
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17 **D. On All Causes of Action**

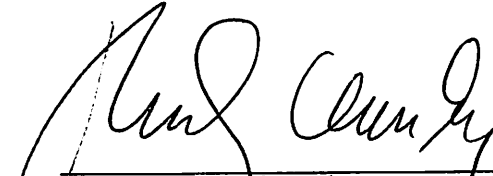
18 1. For costs of suit.

19 2. For an award of attorney fees and expert fees in bringing and
20 maintaining this action. 17 USC 505; *Fogerty v. Fantasy, Inc.* (1994) 510,
21 U.S. 517.
22

23 3. An award to Plaintiff of any other relief that the Court deems
24 just and proper under the circumstances of this case.
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Dated: August 23, 2017 .



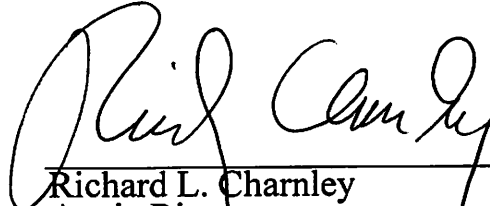
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DONALD P. BORCHERS

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DEMAND FOR JURY TRIAL

Plaintiff demands a jury trial on all causes of action.

Dated: August 23, 2017



Richard L. Charnley
Annie Rian
Attorneys for Plaintiff
DONALD P. BORCHERS

4824-2695-2526, v. 1