

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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THE WEINSTEIN COMPANY, LLC, : Index No. 150019/2009
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Plaintiff, :
 :
vs. :
 :
LIONS GATE ENTERTAINMENT CORP., :
 :
Defendant. :
 :
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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT LIONS GATE ENTERTAINMENT CORP.'S ORDER TO SHOW CAUSE FOR DISMISSAL

Defendant, Lions Gate Entertainment Corp. (“Lionsgate”), by its attorneys, Herrick, Feinstein LLP, respectfully submits this Memorandum of Law in support of its application, brought on by order to show cause, to dismiss the complaint pursuant to CPLR §§ 3211(a) (4) and (7), based on a prior filed California action or, alternatively, for failure to state a claim upon which relief can be granted.

I.

PRELIMINARY STATEMENT

This lawsuit is duplicative of an earlier and currently pending action filed in California Superior Court for the County of Los Angeles (being *Lionsgate Films, Inc. v. The Weinstein Company, LLC*, LASC Case No. BC 406990) (the “California Action”), which involves similar parties in interest and the identical key factual and legal issues of whether Plaintiff, The Weinstein Company, LLC (“Weinstein”), the same defendant in the California Action, has any contract rights in the award winning film *Push: Based on the Novel by Sapphire* (“Push”). Weinstein’s filing of this action in New York was a blatant effort to forum shop in that it was filed several hours after the California Action was not only filed but also served on Weinstein.

There is no rationale reason for this dispute to be resolved in New York, which is far

removed from the events and issues at the heart of the matter. Indeed, the total lack of connection between New York and this case shows that Weinstein's filing was pure gamesmanship, meant to force Lionsgate to litigate on two coasts. Because of this case's overwhelming similarity in parties and issues to the first-filed California Action, this Court should dismiss the Weinstein complaint in its entirety in accordance with New York law providing that the court which has first taken jurisdiction is the one in which the matter should be determined.¹ C.P.L.R. 3211(a)(4); *White Light Prods., Inc. v. On the Scene Prods., Inc.*, 660 N.Y.S.2d 568, 572, 231 A.D. 2d 90, 96 (1st Dep't 1997).

Alternatively, Weinstein's instant action should also be dismissed on the merits on the grounds that its sole cause of action (being for tortious interference with a contract) fails because, as a matter of law and on the face of the complaint, it lacks the essential element of a valid contract. Specifically, Weinstein bases its tortious interference claim on an alleged oral agreement with the producers of *Push* (the "Producers") for the exclusive worldwide distribution and licensing rights. Yet, exclusive agreements for such rights are required under the United States Copyright Act of 1976 (the "Copyright Act") to be in writing and signed by the owner of those rights, and a grant of exclusive distribution rights is deemed such a "transfer." *See* 17 U.S.C. § 204(a) ("[a] transfer of copyright ownership ... is not valid unless [it] is in writing and signed by the owner of the rights"). Because Weinstein's alleged agreement for the rights to *Push* was never written, as admitted in the complaint (see paragraph 18), Weinstein cannot, as a matter of law, meet the essential element of having a valid contract and its sole cause of action therefore cannot stand.

For these reasons, among others, as fully explained below, Lionsgate respectfully requests that Weinstein's complaint be dismissed with prejudice.

¹ If this Court ultimately decides that justice does not require dismissal of Weinstein's claims (despite the arguments stated herein), then it should use its discretion to stay all proceedings in this action pending the resolution of the first-filed California Action.

II.

FACTUAL BACKGROUND

Both the California Action and this New York action arise from Weinstein's claim that it had an enforceable agreement for the exclusive distribution and licensing rights to *Push*.

Affidavit of Wayne Levin, Esq., sworn to on February 9, 2009 (the "Levin Aff.") at ¶ 3. This is clear from reviewing the complaint in the California Action and the Weinstein complaint filed in this action (the "Weinstein Complaint"). See Affidavit of Bryan Sullivan, Esq., sworn to on February 9, 2009 ("Sullivan Aff."), Exh. A; Affirmation of Barry Werbin, Esq., dated February 10, 2009 ("Werbin Aff."), Exh. A.

Push premiered at the January 2009 Sundance Film Festival and was the recipient of several major awards, including the Grand Jury Prize: U.S. Dramatic, and the Audience Award: U.S. Dramatic. *Id.* When Lionsgate became aware that Weinstein claimed it had an agreement for certain distribution rights to *Push*, the Producers and their representatives unambiguously represented that no such agreement was reached. See Levin Aff. at ¶ 3. Relying on those representations, Lionsgate entered into a written agreement for the exclusive United States and Canadian distribution rights to *Push*. *Id.* at ¶ 3; Werbin Aff., Exh. A [Weinstein Complaint at ¶20]. The Producers further informed Lionsgate that Weinstein had threatened them (the Producers) with litigation. After entering the written agreement for the rights to *Push*, Weinstein told Lionsgate that Weinstein would have to drag Lionsgate into any litigation. Levin Aff. at ¶ 4.²

In light of Weinstein's claims regarding *Push* and its threats of litigation against the Producers, Lionsgate was concerned that any assertion by Weinstein of its alleged claim to the rights in *Push* would interfere with Lionsgate's distribution and marketing plans for the film. *Id.* at ¶ 5. Lionsgate was also concerned that Weinstein may bring an injunction on the eve of the

² This is consistent with the allegations in the Weinstein Complaint that Lionsgate was allegedly only informed that Weinstein had entered into an agreement for distribution of the film. See Werbin Aff., Exh. "A" [Weinstein Complaint ¶ 24].

marketing or distribution of *Push*, which would endanger its entire distribution plan. *Id.* at ¶ 5. Distributing and marketing a film are no easy tasks and require a substantial investment of time and money. *Id.* at ¶ 6. It requires extensive planning to market the film through press junkets and advertising as well as actually placing the film into theaters, which have limited space and are scheduled in advance. *Id.* All of this can cost in the millions of dollars. *Id.* So, in order to protect its rights in *Push* and its substantial monetary investment, on February 4, 2009, Lionsgate Films, Inc.³ (“Lionsgate”) filed the California Action seeking the following judicial declarations:

- (a) Neither The Weinstein Company, LLC nor any of its subsidiaries or affiliates entered into an enforceable or binding agreement for any rights in the film entitled *Push: Based on the Novel by Sapphire*; and
- (b) Neither The Weinstein Company, LLC nor any of its subsidiaries or affiliates has any right, title or interest in the film entitled *Push: Based on the Novel by Sapphire*.

Levin Aff. at ¶ 7; Sullivan Aff., Exh. “A.” At the time Lionsgate filed the California Action, it was unaware of whether or not Weinstein would carry out its threat of litigation, or of Weinstein's specific plans for the threatened litigation, including but not limited to when Weinstein might file the threatened lawsuit. Levin Aff. at ¶ 8.

The complaint for the California Action was filed with the California Superior Court and served upon Weinstein’s registered agent for service of process in California by 11:35 a.m. PST (2:35 p.m. EST) on February 4, 2009. Sullivan Aff., Exh. “B” [Proof of Service]. Just over six hours later, on the night of February 4, 2009, at approximately 8:59 p.m. EST, Weinstein filed the instant action (the “New York Action”) electronically against Lionsgate, obviously in

³ In its rush to the courthouse, Weinstein sued the wrong entity. Lionsgate Films Inc. is the entity that contracted for the rights to *Push*. Lions Gate Entertainment Corp. is Lionsgate Film Inc.’s parent corporation (both entities shall be referred to as “Lionsgate” herein). Weinstein thus sued the wrong entity in New York. For this additional reason, this Complaint should be dismissed. See *La Potin v. Julius Lang Co.*, 290 N.Y.S.2d 619, 619-20, 30 A.D.2d 527, 528 (1st Dep’t 1968) (the appellate court reversed the trial court’s denial of an individual defendant’s motion to dismiss the complaint for breach of contract because the individual defendant was not a party to the contract).

response to Lionsgate's California filing. Werbin Aff., Exh. "B" [NY Supreme Case Docket]. The following morning, Weinstein served its Complaint. Levin Aff. at ¶ 9.

In its complaint, Weinstein alleges that on January 27, 2009, representatives of the Producers offered Weinstein the exclusive worldwide licensing and distribution rights to *Push* on the condition that Weinstein agree to a series of specific terms and demands. Werbin Aff., Exh. "A" [Weinstein Complaint ¶ 12]. Weinstein vaguely alleges that these terms included a minimum guarantee that was to be payable on a specific schedule, a distribution fee that varied by territory, payment of specific bonuses for box office performance and payment of specific bonuses if the film should win certain awards and preservation of editing rights. *Id.*, Exh. "A" [Weinstein Complaint ¶ 13]. The Weinstein Complaint further alleges that on January 27, 2009, Weinstein accepted the offer and that the Producers' representatives promised Weinstein that they would immediately provide Weinstein with a written licensing and distribution agreement memorializing the terms of the Agreement. *Id.*, Exh. "A" [Weinstein Complaint ¶ 14].

Weinstein then alleges:

[N]otwithstanding their prior promise to provide [Weinstein] with a written licensing and distribution agreement, no written documentation of the deal was ever provided to [Weinstein], on January 27, 2009 or thereafter.

Id., Exh. "A" [Weinstein Complaint ¶ 18] (emphasis added).

As to its cause of action against Lionsgate for tortious interference with contract, Weinstein alleges:

Lionsgate knew or should have known that [Weinstein] and the owners of *Push* and their representatives had entered into the Agreement, a valid contract for the licensing and distribution rights to *Push*. Nonetheless, Lionsgate intentionally interfered with and procured a breach of that contract by intentionally and wrongfully inducing the owners of *Push* and their representatives to enter into

another distribution agreement with Lionsgate for the same and conflicting distribution rights to *Push*.

Id., Exh. “A” [Weinstein Complaint ¶ 27].

Not satisfied with its frivolous claim against Lionsgate, Weinstein filed two additional separate actions in New York over its alleged agreement for the exclusive distribution and licensing rights to *Push*. *Id.*, Werbin Aff., Exhs. “C” [Smokewood Complaint] and “D” [Cinetic Complaint]. One action is against Smokewood Entertainment Group, LLC (“Smokewood”), which Weinstein alleges is the financier and co-owner of *Push*, for breaching Weinstein’s alleged agreement for the distribution and licensing rights to *Push* (the “Smokewood Action”). *Id.*, Exh. “C” [Smokewood Complaint at ¶¶ 2, 3]. The other action is against Cinetic Media, Inc. and its principals John Sloss and Bart Walker (collectively, “Cinetic”), who represented, among others, Smokewood in negotiating distribution and licensing rights to *Push* (the “Cinetic Action”). *Id.*, Exh. “D.”

III.

ARGUMENT

A. **Weinstein’s Complaint Should Be Dismissed Because The California Action, Which Involves Similar Parties And The Same Issues, Was Filed First and in Good Faith, and Provides The Most Convenient Forum**

New York C.P.L.R. §3211(a)(4) states that a party may move for judgment dismissing one or more cause of actions as asserted against him on the ground that “there is another action pending between the same parties for the same cause of action in a court of any state or the United States.”

“[I]n deciding a motion to dismiss based on the pendency of another action, the analysis is similar to that employed in entertaining a motion predicated on forum non conveniens. However, where another action is pending, a major concern, as a matter of comity, is to avoid the potential for conflicts that might result from rulings issued by courts of concurrent jurisdiction.”

White Light Prods., Inc. v. On the Scene Prods., Inc., 660 N.Y.S.2d at 570 , 231 A.D.2d at 93 (1st Dep’t 1997).

New York courts first look to a three-part test, all of which must be met, before a CPLR 3211(a)(4) dismissal can be considered. The competing actions must: (1) share substantially the same parties; (2) share substantially the same issues; and (3) give rise to the risk of conflicting decisions on those issues. *Id.* at 93-95.

If an action qualifies for potential dismissal under this test, the courts then look at another three issues: (1) which action was filed first; (2) the good faith (or lack thereof) in each of the party’s filings; and (3) the convenience of each forum. *Id.* at 95-97.

1. This Action Meets the Threshold Test for Dismissal Pursuant to CPLR 3211(a)(4).

All three of the mandatory conditions for a dismissal pursuant to CPLR 3211(a)(4) identified in *White Light, supra*, are met here.

First, the parties are nearly identical. *Compare* Sullivan Aff. Exh. “A” [California Complaint], *with* Werbin Aff. Exh. “B” [Weinstein Complaint]. The plaintiff in the first filed California Action is Lionsgate Films, Inc., which is a subsidiary of Lionsgate, the defendant in the New York Action. *Id.* Weinstein, the plaintiff in the New York action, is the defendant in the first filed California Action. *Id.*

Second, the issues in the California Action are “substantially the same” as the issues in this action. Both arise from the same nexus of facts—Weinstein’s alleged distribution and licensing rights to *Push*. *Id.* The fact that the relief sought in the California Action is declaratory while the relief sought in this action is money damages (although undisclosed) does not change the analysis. *See Stanley Elec. Serv., Inc. v. City of New York*, 275 N.Y.S.2d 222, 223-24, 26 A.D. 2d 951, 951 (2nd Dep’t 1966) (when the difference between the two actions lies only the relief demanded, and the relief sought in either case would be available in the other, a motion to dismiss on the grounds of a prior action pending should be granted). Indeed, Weinstein is required to raise its tortious interference claim in the California Action as a compulsory

counterclaim, or it will be barred from bringing such claim in any later lawsuit. *See* Cal.Civ.Proc. § 426.30 (if defendant's cause of action against plaintiff is related to the subject matter of the complaint, then it must be raised by cross-complaint [and] failure to plead it will bar defendant from asserting it in any later lawsuit); *AL Holding Co. v. O'Brien & Hicks, Inc.*, 75 Cal.App.4th 1310, 1313-1314, 89 Cal.Rptr.2d 918, 920 (Cal. Ct. App. 1999) (same). The fact remains that if Weinstein has no valid and enforceable contract, then his claim for tortious interference obviously fails as well.

Finally, there is no question that if this case is not dismissed, there will be a risk of divergent rulings in California and New York in that both cases involve the issue of Weinstein's and Lionsgate's rights in *Push*. *Compare* Sullivan Aff. Exh. "A" [California Complaint], *with* Werbin Aff. Exh. "B" [Weinstein Complaint]. Indeed, this was Weinstein's likely goal its later-filed action. Moreover, if Lionsgate is successful in the California Action (i.e., a California court finds that Weinstein does not have any rights in *Push*), then this case will be resolved as will the Smokewood Action, wherein Weinstein alleges Smokewood breached the purported contract upon which Weinstein bases its interference claim against Lionsgate. *Id.*, *see also* Werbin Aff. Exhs. "A" [Weinstein Complaint] and "C" [Smokewood Complaint].

2. The California Action was Filed First, Was Filed in Good Faith, and Provides a More Convenient Forum.

As a general rule, New York courts follow the first-in-time rule, which provides that "the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere." *White Light, supra*, 231 A.D. at 96. As such, there is a presumption that this action, which was undeniably the later-filed action, should be dismissed in deference to the California Action.

However, the first-filed presumption is not an absolute rule. *Id.* If, for example, Weinstein could show that Lionsgate had filed the California Action in bad faith, as a preemptive strike against litigation it knew Weinstein planned to bring, there would be no deference to that earlier filing. *See Certain Underwriters at Lloyd's v. Hartford Accident & Indem. Co.*, 791

N.Y.S.2d 90, 91, 16 A.D.3d 167, 168 (1st Dep't 2005) (dismissing first-filed action where it “was plain that [the] action was motivated simply by plaintiffs' wish to gain a tactical advantage through forum shopping”). In this case, however, Lionsgate's first-filed California Action was brought in good faith—if there has been any gamesmanship, it has been on the part of Weinstein in filing this action in this Court.

Lionsgate did not file the California Action out of anticipation of Weinstein filing a lawsuit against it. Indeed, Lionsgate did not know if, or when, Weinstein was going to file any threatened lawsuit to enforce its rights under the alleged agreement for the rights to *Push*. Levin Aff. at ¶ 8. Rather, Lionsgate filed the California Action solely to protect its rights in *Push*, which it believed were being disputed, so it could clear the Weinstein cloud on its rights to distribute *Push* and be free to commit to the investment of millions of dollars for the distribution and marketing of it. *Id.* at ¶¶ 5, 6, 7.

Even in cases where the circumstances have more strongly indicated a threat of litigation, courts have declined to find a disqualifying anticipatory filing. For example, in *BuddyUSA, Inc. v. Recording Indus. Ass'n of Am., Inc.*, 21 Fed. Appx. 52, 55-56 (2d Cir. 2001), the plaintiff in the first-filed action, who sought a declaration as to his non-infringement of a copyright, had received a letter from the copyright holders warning that the plaintiff's failure to take immediate steps to cease infringement would leave holders with “little choice” but to “seek additional legal remedies.” Nevertheless, the Second Circuit honored the plaintiff's first filed action, holding that “courts have often refused to characterize a suit as anticipatory where it is filed in response to a notice letter that does not explicitly ‘inform[] a defendant of the intention to file suit, a filing date, and/or a specific forum for the filing of the suit’” *Id.*; see also *Hanson PLC v. Metro-Goldwyn-Mayer Inc.*, 932 F. Supp. 104, 108 (S.D.N.Y. 1996) (“[Plaintiffs] surely had the right both to reject [Defendant's] offer to discuss settlement and to take an aggressive stance by immediately filing a declaratory judgment action when they received the cease-and-desist

letter”).⁴ In the relatively few cases where courts have characterized a first-filed case as anticipatory, the evidence of a specific litigation threat that prompted the filing was clear and undeniable. *See, e.g., L-3 Communic'n Corp. v. SafeNet, Inc.*, 841 N.Y.S. 2d 82, 86, 45 A.D.3d 1, 6 (1st Dep't 2007) (parties had been engaged in ongoing settlement negotiations during which time the party that filed first in a different state upon termination of the negotiations had been shown a draft complaint by the other party during the negotiations).

Indeed, if any party has acted improperly, it was Weinstein, who filed its lawsuits some six hours after it was served with Lionsgate's lawsuit. *Compare* Sullivan Aff., Exh. "B" [Proof of Service], *with* Werbin Aff., Exh. "B" [NY Supreme Case Docket]. It is clear that Weinstein raced to his New York lawyers upon being served around 2:30 p.m. on the afternoon of February 4, 2009, with the California Action, and merely filed his New York action against Lionsgate electronically just before 9 p.m. the same day in its own effort to forum shop and force Lionsgate to litigate on both coasts.

Finally, there is the issue of convenience, identified in *White Light* as central, even determinative in some cases. 231 A.D.2d at 95, 97. Here, there is no question that the California Action provides the most convenient forum. The California Action is venued in Los Angeles, where both Lionsgate and Weinstein maintain offices and where the distribution deals likely will be entered into for *Push*. Moreover, Weinstein's alleged agreement was negotiated in Park City, Utah. Werbin Aff., Exh. "C" [Smokewood Complaint at ¶ 11]. Weinstein can (and must) file any compulsory counterclaim -- such as its tortious interference claim -- in the California Action. Smokewood (the Producers), whom Weinstein also sued for breach of contract, is a

⁴ To the extent Weinstein argues that Lionsgate's action is entitled to less weight purely because it seeks a declaratory judgment, the courts have explicitly rejected that argument. "[T]he fact that an action is one seeking a declaratory judgment does not . . . necessarily mean that it is an improper anticipatory filing . . . [because] the declaratory judgment was created to 'enable a party who is challenged, threatened, or endangered in the enjoyment of what he claims to be his rights, to initiate the proceedings against his tormentor and remove the cloud by an authoritative determination of plaintiff's legal right, privilege and immunity and the defendant's absence of right, and disability.'" *Everest Capital Ltd. v. Everest Funds Mgmt., LLC*, 178 F. Supp. 2d 459, 469 (S.D.N.Y. 2002) (citing *U.S. v. Doherty*, 786 F.2d 491, 498-99 (2d Cir. 1986)). Such is the case here where Lionsgate filed the California Action seeking declaratory relief in response to Weinstein's challenge to Lionsgate's enjoyment of its rights to *Push*.

Colorado limited liability company. Werbin Aff., Exh. C, §4. The only connection this alleged agreement has to New York is that Weinstein filed a lawsuit here. Simply put, this dispute is over a Hollywood movie deal — it should not be litigated a continent away from the people, evidence, and events at the center of the case, simply to satisfy Weinstein’s preference of a New York forum. *Compare* with *L-3*, supra, 45 A.D.3d at 6 (finding CPLR 3211(a)(4) dismissal inappropriate where parties were located or did business in New York, underlying agreement was negotiated in New York, and agreement contained express New York choice-of-law and jurisdiction provisions).

Lionsgate’s California Complaint is the first filed, was filed in good faith, and provides the most convenient forum. The other requirements for dismissal under C.P.L.R. 3211(a)(4) are met. There is no reason to allow this case to proceed when all issues may be resolved by the first-filed California Action. Accordingly, this Court should dismiss this complaint in its entirety.

B. Weinstein’s Intentional Interference With Contract Claim Fails Because The Complaint Alleges Interference With An Oral Contract For The Exclusive Distribution And Licensing Rights To *Push*, But Such An Agreement, As A Matter Of Federal Law, Must Be Written And Signed By *Push*’s Copyright Owners

The Weinstein Complaint must also be dismissed substantively because it fails to state a cause of action pursuant to CPLR 3211(a)(7). Here, as a matter of law and based on the allegations of the Weinstein Complaint, Weinstein cannot establish the existence of a valid agreement, which is an essential element of its tortious interference claim. *See* Werbin Aff., Exh. “A” [Weinstein Complaint at ¶ 18].

The essential elements of a claim of tortious interference with contract are (1) the existence of a valid contract between the claiming party and another; (2) the defendant’s knowledge of that contract; (3) the defendant’s intentional procuring of a breach of that contract; and (4) damages to the claiming party as a result of that breach. *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94, 595 N.Y.S. 2d 931, 934 (1993). A cause of action for tortious interference with

contractual relations must be dismissed when “[t]he most important element in this cause of action, the existence of a valid contract, is missing.” *Long Island Pen Corp. v. Shatsky Metal Stamping Co.*, 463 N.Y.S.2d 39, 41, 94 A.D.2d 788, 789 (2nd Dep’t 1983).

Here, as pleaded in paragraphs 2 and 27 of the Weinstein Complaint, the contract that allegedly was interfered with was a “contract for the licensing and distribution right to *Push*.” Werbin Aff. Exh. “A” [Weinstein Complaint at ¶¶ 2, 27]. Paragraph 15 of the Weinstein Complaint further admits, in quoting an email sent by David Glasser from the Weinstein Group, that the alleged agreement was to be for “exclusive worldwide distribution rights...” *Id.*, Exh. “A” [Weinstein Complaint at ¶ 15]. It is thus undisputed that this alleged contract is for exclusive rights in a work protected by copyright. *See* 17 U.S.C. § 102(a)(6) (“Subject matter of copyright: In general - (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression.... Works of authorship include the following categories:... (6) motion pictures and other audiovisual works”).

Under the Copyright Act, 17 U.S.C. § 101, a “transfer of copyright ownership” is defined as “an assignment, ... exclusive license, or any other conveyance ... of a copyright or of any of the exclusive rights comprised in a copyright . . .” (Emphasis added.) Among the exclusive rights reserved to the copyright owner is the right of distribution. 17 U.S.C. § 106 (“the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: ... (3) to distribute copies ... of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”).

For such a grant of exclusive rights to be valid, it must be in writing. *See* 17 U.S.C. § 204(a); *see also Valente-Kritzer Video v. Pinckney*, 881 F.2d 772, 774 (9th Cir. 1989) (17 U.S.C. § 204 required that the agreement for the exclusive right to make and distribute a video based on a book be in writing).

17 U.S.C. § 204(a) states:

A transfer of copyright ownership, other than by operation of law,
is not valid unless an instrument of conveyance, or a note or

memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.

17 U.S.C. § 204(a) (emphasis added); *see also Radio Television Espanola S.A. v. New World Entm't, Ltd.*, 183 F.3d 922, 927 (9th Cir. 1999) (faxes following oral agreement containing references to a "deal" are not enough without adequate information regarding the terms); *Papa's-June Music, Inc. v. McLean*, 921 F. Supp. 1154, 1160 (S.D.N.Y. 1996) ("[b]ecause the complaint does not allege a signed writing as required by section 204(a), there was no transfer of copyright ownership").

The landmark case on this issue is the Ninth Circuit decision of *Effects Assocs., Inc. v. Cohen*, 908 F. 2d 555, 557 (9th Cir. 1990), where the Court stated:

Section 204's writing requirement is not unduly burdensome; it necessitates neither protracted negotiations nor substantial expense. The rule is really quite simple: If the copyright holder agrees to transfer ownership to another party, that party must get the copyright holder to sign a piece of paper saying so. It doesn't have to be the Magna Charta [sic]; a one-line pro forma statement will do.

The purpose of this rule is to protect copyright owners from fraudulent claims and to enhance predictability and certainty of ownership, which was Congress's paramount goal when it revised the Copyright Act in 1976. *Konigsberg Int'l Inc. v. Rice*, 16 F.3d 355, 357 (9th Cir. 1994). As a result, "the terms of any writing purporting to transfer copyright interests, even a one-line pro forma statement, must be clear....And, of course, the owner of the copyright interests being conveyed must sign the document." *Papa's June Music, Inc. v. McLean*, 921 F. Supp. at 1159. The issue of whether any particular writings satisfy Section 204(a) in one of law. *Lyrick Studios, Inc. v. Big Idea Prods., Inc.*, 420 F.3d 388, 392 (5th Cir. 2005).

Lyrick Studios is particularly instructive on this issue. In that case, following a jury trial, the plaintiff obtained a judgment finding that the defendant breached their agreement under

which the plaintiff obtained an exclusive license to distribute children's cartoon programs from the defendant. *Id.* at 390. On appeal, the Court reversed the judgment because the plaintiff did not, and could not, satisfy the requirement of 17 U.S.C. 204(a) that all transfers of copyright (such as exclusive licenses) must be in writing and signed by the transferor. *Id.* at 390. The plaintiff's main argument was that it had a writing in the form of two faxes discussing the terms of the agreement and an internal memorandum confirming the agreement. *Id.* at 393. The Court rejected this argument, finding that the faxes (which were only a proposal, subject to formal binding documentation) did not constitute a sufficient written note or memorandum of a copyright interest transfer, and the internal memorandum was not the kind of memorandum of transfer envisioned by 17 U.S.C. 204(a). *Id.* at 395-96.

By way of further example, in the case of *Time, Inc. v. Kastner*, 972 F. Supp. 236, 237 (S.D.N.Y. 1997), a magazine brought an action against a screenwriter for a declaratory judgment that the screenwriter did not obtain the copyright interest in a published article in *Fortune* magazine. The defendant counterclaimed for breach of contract, arguing that he had two oral agreements by which he obtained the film rights to the article. *Id.* at 238. However, the screenwriter admitted there was no writing signed by the magazine. *Id.* In light of this admission, the district court applied 17 U.S.C. § 204 and held that the screenwriter did not have a valid claim. *Id.* at 239.

Like the plaintiff in *Lyrick Studios* and the screenwriter in *Time, Inc.*, Weinstein expressly admits in its complaint that it never had a *written* agreement for the licensing and distribution rights to *Push*. Werbin Aff., Exh. "A" [Weinstein Complaint at ¶ 14, 18, 19]. Indeed, at paragraph 18 of the complaint, Weinstein alleges as follows:

[N]otwithstanding their prior promise to provide [Weinstein] with a written licensing and distribution agreement, no written documentation of the deal was ever provided to [Weinstein], on January 27, 2009 or thereafter.

Id., Exh. "A" [Weinstein Complaint ¶ 18].

Because the Weinstein Complaint fails to allege or attach any writing signed by the Producers—the copyright owner—or their agent that confirms the “transfer” of the exclusive distribution rights to the film, and concedes such alleged agreement was not in writing, Weinstein’s alleged contract for the exclusive distribution and licensing rights to *Push* is not valid or enforceable. See 17 U.S.C. § 204(a). Thus, Weinstein cannot allege, as a matter of law, the requisite element of a valid contract. See *Kronos, Inc.*, 81 N.Y.2d at 94, 595 N.Y.S. 2d at 934; *Long Island Pen Corp.*, 463 N.Y.S.2d at 41, 94 A.D.2d at 789. Any other finding would defeat the purpose of 17 U.S.C. § 204(a).

The Weinstein Complaint should therefore be dismissed with prejudice.

C. If This Court Decides That Justice Does Not Require Dismissal Of The Weinstein Complaint, The Court Should Stay The Instant Action Pending Resolution Of The First Filed California Action

The Court “need not dismiss upon [the first-to-file] ground but may make such order as justice requires”—rather, a viable alternative to dismissing a second-in-time complaint is to stay the second action while the first action is litigated. C.P.L.R. 3211(a)(4); see also *Case Capital Corp. v. Morgan Invs., Inc.*, 546 N.Y.S.2d 127, 127, 154 A.D.2d 501, 501 (2nd Dep’t 1989); *Graham v. Dim-Rosy U.S.A. Corp.*, 512 N.Y.S.2d 700, 700-01, 128 A.D.2d 417, 417-18 (1st Dep’t 1987) (staying action alleging interference with employment contract). Accordingly, if this Court deems that dismissal is not warranted by the circumstances (which dismissal is warranted), this Court should use its discretion to stay the instant action pending resolution of the first-California Action, which could resolve all the issues raised here and would avoid a potential conflict in rulings between the California and New York state courts. However, it is respectfully urged that dismissal is warranted for all of the reasons enunciated herein.

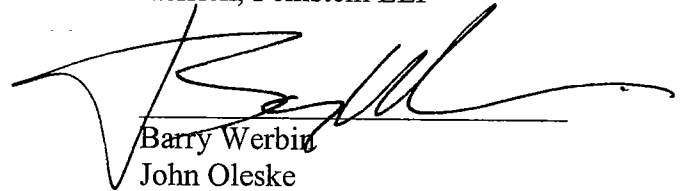
IV.

CONCLUSION

For the foregoing reasons, this Court should dismiss Weinstein's Complaint in its entirety with prejudice and with costs awarded to Lionsgate.

Dated: New York, New York
February 10, 2009

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