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8

9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA  
11

GREENBERG GLUSKER FIELDS CLAMAN  
& MACHTINGER LLP  
1900 Avenue of the Stars, 21st Floor  
Los Angeles, California 90067-4590

12 DANJAQ, LLC, a Delaware Limited  
liability company; METRO-  
13 GOLDWYN-MAYER STUDIOS  
INC., a Delaware corporation;  
14 UNITED ARTISTS CORPORATION,  
a Delaware corporation; SEVENTEEN  
15 LEASING CORPORATION, a  
Delaware corporation; EIGHTEEN  
16 LEASING CORPORATION, a  
Delaware corporation; NINETEEN  
17 LEASING CORPORATION, a  
Delaware corporation; TWENTY  
18 LEASING CORPORATION, and a  
Delaware corporation; TWENTY-ONE  
19 LEASING COMPANY LLC, a  
Delaware limited liability company

20 Plaintiffs,

21 v.

22 UNIVERSAL CITY STUDIOS LLC, a  
23 Delaware limited liability company;  
NBCUNIVERSAL MEDIA, LLC, a  
24 Delaware limited liability company;  
and AARON BERG, an individual,

25 Defendants.  
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28

Case No. 2:14-CV-02527 DDP-Ex

Assigned To: Hon. Dean D. Pregerson

**NOTICE OF MOTION AND  
MOTION TO DISMISS  
PLAINTIFFS' COMPLAINT  
AGAINST DEFENDANTS  
UNIVERSAL CITY STUDIOS LLC  
AND NBCUNIVERSAL MEDIA,  
LLC; MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT**

([Proposed] Order lodged concurrently  
herewith)

Date: June 30, 2014  
Time: 10:00 a.m.  
Place: Courtroom 3 – 2nd Floor

Action filed on April 3, 2014

**GREENBERG GLUSKER FIELDS CLAMAN  
& MACHTINGER LLP**  
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Los Angeles, California 90067-4590

1           **TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:**  
 2           **PLEASE TAKE NOTICE** that on June 30, 2014 at 10:00 a.m. in  
 3 Courtroom 3 of the above-entitled Court, located at 312 N. Spring Street, Los  
 4 Angeles, CA 90012, Defendants Universal City Studios LLC and NBCUniversal  
 5 Media, LLC (collectively, “Universal”) will and hereby do move to dismiss the  
 6 Complaint filed by plaintiffs Danjaq, LLC, Metro-Goldwyn-Mayer Studios Inc.,  
 7 United Artists Corporation, Seventeen Leasing Corp., Eighteen Leasing Corp.,  
 8 Nineteen Leasing Corp., Twenty Leasing Corp., and Twenty-One Leasing Co.,  
 9 LLC (collectively “Plaintiffs”).

10           This motion is made pursuant to Fed. R. Civ. P. Rule 12(b)(6) on the grounds  
 11 that it fails to state a valid claim for relief. Plaintiffs concede that Universal did not  
 12 play any role in creating the allegedly infringing screenplay at issue in the  
 13 Complaint, and allegations regarding potentially infringing future works that may  
 14 be created based on the screenplay are speculative, conclusory and premature.

15           This Motion is made following the conference of counsel pursuant to Local  
 16 Rule 7-3 which took place on May 20, 2014.

17           This Motion is based on this Notice of Motion and Motion, the attached  
 18 Memorandum of Points and Authorities, the [Proposed] Order submitted herewith,  
 19 the other files, records, pleadings and papers in this action, any reply papers that

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1 may be filed in connection, and on such further oral or documentary evidence as  
2 may be presented at or before the hearing in this matter.

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DATED: May 27, 2014

BERTRAM FIELDS  
AARON J. MOSS  
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By:   
BERTRAM FIELDS  
Attorneys for Defendants UNIVERSAL  
CITY STUDIOS LLC and  
NBCUNIVERSAL MEDIA, LLC

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs allege that a first-draft “spec script” entitled *Section 6* (the  
4 “Screenplay”), a British spy thriller written by defendant Aaron Berg (“Berg”),  
5 infringes their copyrights in various works featuring the fictional character James  
6 Bond (the “Bond Works”).

7 Plaintiffs concede that Berg wrote the Screenplay without any input or  
8 involvement from the Universal defendants, and that he attempted to sell his script  
9 to several other studios before Universal acquired it. Plaintiffs also concede that  
10 they were expressly advised that, were Universal ever to produce a motion picture  
11 based on the Screenplay – a decision which has not yet been made – the film would  
12 not violate plaintiffs’ rights.

13 However, in an effort to claim an unfounded monopoly on the British spy  
14 genre, and to scare away Universal and any other would-be competitors to James  
15 Bond, Plaintiffs rushed to file this needless action. Universal moves to dismiss on  
16 the ground that the Complaint states no claims upon which relief may be granted  
17 against Universal. Universal is not liable for direct infringement, nor on any  
18 secondary liability theory, because the Complaint contains no factual allegations  
19 that Universal wrote or otherwise assisted, induced or contributed in any way to the  
20 Screenplay. Plaintiffs’ claims against Universal are instead based upon wholly  
21 conclusory allegations in which they speculate (on “information and belief”) that  
22 Universal is in the process of using Berg’s initial draft as the basis for a revised  
23 draft and/or a motion picture that they simply assume will infringe the Bond Works  
24 when and if it is created. Such threadbare allegations about hypothetical future  
25 infringement in works yet to be produced are simply not actionable. Were  
26 Universal to revise the Screenplay and produce a motion picture that infringed the  
27 Bond Works, all of Plaintiffs’ rights and remedies under the Copyright Act would  
28 remain available to them. At this early date, however, a revised script has not even



1 been completed, let alone approved for production. It would be a patent waste of  
 2 resources for the parties and the Court to entertain this action at such a premature  
 3 stage.

4  
 5 **II. STATEMENT OF FACTS**

6 Plaintiffs allege that they are the owners of copyrights in the Bond Works,  
 7 including the James Bond character. Compl. ¶¶ 26-35.<sup>1</sup> In 2013, Berg wrote the  
 8 Screenplay, which Plaintiffs contend is substantially similar to the Bond Works.  
 9 Compl. ¶¶ 36, 56.

10 Plaintiffs do not, and cannot, assert that Universal was involved in creating  
 11 the Screenplay. To the contrary, Plaintiffs concede that the Screenplay was written  
 12 by Berg, and that, only after completing the Screenplay, did Berg distribute it to  
 13 motion picture studios including DreamWorks, Fox, Paramount, Sony Pictures,  
 14 Universal and Warner Bros. Compl. ¶¶ 36, 39. Universal subsequently acquired  
 15 rights from Berg to reproduce and develop the Screenplay into a motion picture.  
 16 Compl. ¶ 43.

17 In November 2013, after Plaintiffs learned of the existence of the Screenplay  
 18 and that Universal had acquired rights to it, Plaintiffs wrote a letter to Universal  
 19 contending that Berg's Screenplay infringed their copyrights in the Bond Works.  
 20 Compl. ¶ 7. In this letter, Plaintiffs asked Universal to cease all development of the  
 21 Screenplay. *Id.*

22 In response, Universal represented to Plaintiffs that: (a) Universal had not yet  
 23 even optioned the Screenplay; (b) if Universal elected to develop a motion picture  
 24 based on the Screenplay, it would "deviate significantly from its current iteration";  
 25 and (c) Universal "has no intention of violating [Plaintiffs'] rights." Compl. ¶ 8.  
 26

27 <sup>1</sup> For purposes of this motion to dismiss only, Universal accepts Plaintiffs' factual  
 28 allegations as true. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d  
 1542, 1550 (9th Cir. 1990).

1 Based upon these representations, Plaintiffs told Universal that they would not take  
2 legal action at that time. *Id.*

3 However, with no basis other than unidentified March 2014 “public reports,”  
4 Plaintiffs asserted that “it appears that Universal intends to infringe plaintiffs’  
5 *James Bond* copyrights and is doing so.” Compl. ¶ 9

6 On March 31, 2014, Universal again assured Plaintiffs that “it has no  
7 intention of violating the intellectual property rights of [Plaintiffs].” Compl. ¶ 11.  
8 However, based on Universal’s refusal to provide any “concrete exculpatory  
9 information about the content of *Section 6* to its competitor, Plaintiffs reached the  
10 “conclusion” that Universal was committing copyright infringement. *Id.* In  
11 particular, Plaintiffs concluded (with no factual basis) that “Universal is continuing  
12 to develop a screenplay that constitutes an unauthorized derivative work” based on  
13 the Bond Works, and that “Universal is also preparing a separate, unauthorized  
14 derivative work, in the form of a motion picture, equally in violation” of Plaintiffs’  
15 copyrights. *Id.*

16 Plaintiffs filed this lawsuit on April 3, 2014. Each of their allegations in the  
17 Complaint about Universal’s conduct is based solely on what Plaintiffs claim is  
18 “information and belief.” Compl. ¶¶ 69, 75, 76, 83, 84, 91, 92.

### 19 20 **III. LEGAL STANDARD**

21 Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to  
22 dismiss a pleading for “failure to state a claim upon which relief can be granted.”  
23 Dismissal is proper under Rule 12(b)(6) where there is either a “lack of a  
24 cognizable legal theory” or “the absence of sufficient facts alleged under a  
25 cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699  
26 (9th Cir. 1988).

27 “[A] plaintiff’s obligation to provide the grounds of his entitlement to relief  
28 requires more than labels and conclusions, and a formulaic recitation of the

1 elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S.  
 2 544, 555 (2007) (internal quotation marks and alteration omitted). Although this  
 3 does not require “detailed factual allegations,” it “demands more than an  
 4 unadorned, the defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*,  
 5 556 U.S. 662, 678 (2009) (internal quotation marks omitted). A sufficiently-pled  
 6 claim must be “plausible on its face.” *Id.* (internal quotation marks omitted). “A  
 7 claim has facial plausibility when the plaintiff pleads factual content that allows the  
 8 court to draw the reasonable inference that the defendant is liable for the  
 9 misconduct alleged.” *Id.*

10 The first step in determining whether a claim is sufficiently pled is to identify  
 11 the elements of that claim. *See id.* at 675. A court should then distinguish between  
 12 the pleading’s allegations of fact and its legal conclusions: a court “must take all of  
 13 the factual allegations in the complaint as true,” but should not give legal  
 14 conclusions this assumption of veracity. *Id.* at 678. The court must then decide  
 15 whether the pleading’s factual allegations, when assumed true, “plausibly give rise  
 16 to an entitlement to relief.” *Id.* at 679. “Threadbare recitals of the elements of a  
 17 cause of action, supported by mere conclusory statements, do not suffice.” *Id.* at  
 18 678. Allegations showing only the “mere possibility of misconduct” are also  
 19 insufficient. *Id.* at 679.

## 21 **IV. ARGUMENT**

### 22 **A. The Complaint Does Not State a Claim for Direct Infringement** 23 **Against Universal.**

24 In order to establish copyright infringement, two elements must be proven:  
 25 (1) ownership of a valid copyright, and (2) copying of constituent elements of the  
 26 work that are original. *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1174 (9th Cir.  
 27 2003). “The word ‘copying’ is shorthand for the infringing of any of the copyright  
 28 owner’s [six] exclusive rights” under 17 U.S.C. § 106. *S.O.S., Inc. v. Payday, Inc.*,

1 886 F.2d 1081, 1085 n. 3 (9th Cir. 1989). Subject to a number of exceptions and  
2 defenses:

3 [T]he owner of copyright . . . has the exclusive rights to  
4 do and to authorize any of the following: (1) to *reproduce*  
5 the copyrighted work in copies or phonorecords; (2) to  
6 *prepare derivative works* based on the copyrighted work;  
7 (3) to *distribute* copies or phonorecords of the  
8 copyrighted work to the public by sale or other transfer of  
9 ownership, or by rental, lease, or lending; (4) in the case  
10 of literary, musical, dramatic, and choreographic works,  
11 pantomimes, and motion pictures and other audiovisual  
12 works, to *perform the copyrighted work publicly*; (5) in  
13 the case of literary, musical, dramatic, and choreographic  
14 works, pantomimes, and pictorial, graphic or sculptural  
15 works, including the individual images of a motion  
16 picture or other audiovisual work, to *display the*  
17 *copyrighted work publicly*; (6) in the case of sound  
18 recordings, to *perform the copyrighted work publicly, by*  
19 *means of a digital audio transmission*.

20 17 U.S.C. § 106 (emphasis added).

21 Plaintiffs conclusorily allege, on information and belief, that Universal  
22 directly infringed their copyrights in the Bond Works by:

- 23 • “preparing unauthorized derivative works of the Copyrighted  
24 Bond Works in the form of the *Section 6* screenplay and  
25 revisions thereto”;
- 26 • “making unauthorized copies of unauthorized derivative works  
27 of the Copyrighted Bond Works in the form of the *Section 6*  
28 screenplay and revisions thereto”;

- 1 • “distributing copies of the *Section 6* screenplay and revisions
- 2 thereto”; and
- 3 • “preparing an unauthorized derivative work of the Copyrighted
- 4 Bond Works in the form of the *Section 6* motion picture.”

5 Compl. ¶ 69. In other words, Plaintiffs allege the conclusions that Universal’s  
6 actions in connection with three allegedly infringing works – the “Screenplay,” the  
7 “revisions thereto,” and the “*Section 6* motion picture” – violate their copyrights in  
8 the Bond Works. However, the Complaint contains no factual averments of any  
9 actual infringing acts committed by Universal. In particular, the Complaint alleges  
10 that Berg, not Universal, authored the Screenplay.

11

12 **1. The Complaint Does Not Allege that Universal Played Any**  
13 **Role in the Creation of the Screenplay.**

14 While Plaintiffs allege that the Screenplay infringes their copyrights in the  
15 Bond Works, they concede that Berg authored the Screenplay himself without any  
16 input or involvement from Universal. *See* Compl. ¶ 2 (“This lawsuit instead is  
17 about a *James Bond* knockoff that defendant Universal is readying for production,  
18 based on a screenplay that defendant Berg wrote.”); Compl. ¶ 24 (“On information  
19 and belief, *Aaron Berg* wrote the *Section 6* screenplay.”); Compl. ¶ 36 (“On  
20 information and belief, *defendant Berg* wrote a screenplay in 2013, titled *Section*  
21 *6*.”) (Emphasis added). Because it is not factually alleged that Universal wrote or  
22 otherwise contributed to the creation of the Screenplay, Universal cannot be held  
23 liable for its contents. If, as one court put it, “[t]he question is *who* made th[e]  
24 copy,” *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d  
25 Cir. 2008), the answer in this case is clearly Berg, not Universal.

26 Universal’s acquisition of the right to develop the Screenplay into a motion  
27 picture (Compl. ¶ 43), does not implicate any of Plaintiffs’ exclusive rights as a  
28 copyright owner under section 106, nor does Universal’s development of the

1 Screenplay into a revised script. As Plaintiffs are well aware, screenplays are  
 2 rewritten and revised many times before they are “greenlit” for production. Indeed,  
 3 courts have held that “*a defendant may legitimately avoid infringement by*  
 4 *intentionally making changes in a work which would otherwise be regarded as*  
 5 *substantially similar to that of the plaintiff’s.*” *Warner Bros., Inc. v. Am. Broad.*  
 6 *Cos.*, 720 F.2d 231, 241 (2d Cir. 1983) (emphasis added; internal quotation marks  
 7 omitted); *See v. Durang*, 711 F.2d 141, 142 (9th Cir. 1983) (“Copying deleted or so  
 8 disguised as to be unrecognizable is not copying”). Such conduct should be  
 9 encouraged. In no event may it give rise to liability.

10 For this reason, courts “have routinely rejected requests to consider earlier  
 11 drafts of the screenplay” on the basis that “[c]onsideration of earlier versions of the  
 12 screenplay is too unreliable in determining substantial similarity.” *Walker v. Time*  
 13 *Life Films, Inc.*, 615 F. Supp. 430, 435 (S.D.N.Y. 1985); *See*, 711 F.2d at 142  
 14 (granting summary judgment although plaintiff was not allowed discovery of “early  
 15 drafts”); *Quirk v. Sony Pictures Entertainment, Inc.*, 2013 WL 1345075, at \*6  
 16 (N.D. Cal. April 2, 2013) (“even assuming the preliminary drafts . . . include  
 17 indications of copying that was later deleted or revised, the only relevant question”  
 18 is whether “the final movie as filmed, edited, and released contains matter  
 19 substantially similar to protectable elements” of the copyrighted work); *see Hudson*  
 20 *v. Universal Pictures Corp.*, 2004 U.S. Dist. LEXIS 11508, at \*10 (E.D.N.Y. April  
 21 29, 2004) (“The Court is under no obligation to consider the draft Scripts[.]”).  
 22 Rather, it is “the works as they were presented to the public” that is relevant, not  
 23 preliminary internal drafts. *Walker*, 615 F. Supp. at 434; *see Chase-Riboud v.*  
 24 *DreamWorks, Inc.*, 987 F.Supp. 1222, 1227 n.5 (C.D. Cal. 1997).

## 2. Speculation About Hypothetical Future Works Cannot Support an Infringement Claim.

28 Because Plaintiffs concede, as they must, that Universal played no role in

1 creating the Screenplay (*see* Compl. ¶¶ 2, 24, 36), the gravamen of Plaintiffs’ direct  
2 infringement claim against Universal is that, when they are completed, the revised  
3 drafts of the Screenplay and a possible future motion picture based on those revised  
4 drafts will infringe their copyrights in the Bond Works. *See* Compl. ¶ 69. However,  
5 even if the present Screenplay infringed Plaintiffs’ claimed copyrights – which  
6 Berg’s motion strenuously disputes – it does not in any way follow that revised  
7 versions of the Screenplay or the motion picture itself would infringe. And  
8 Plaintiffs have been told, over and over again, that those screenplays – not yet  
9 created – will *not* violate Plaintiffs’ rights.

10 It should first be noted that Plaintiffs do not allege either that revised drafts  
11 of the Screenplay or the motion picture itself *currently* exist. (They do not).  
12 Instead, Plaintiffs speculate that Universal “has *likely* contracted with and/or  
13 authorized writers (including defendant Berg) *to revise and/or assist in revising the*  
14 *Section 6 screenplay.*” Compl. ¶ 45 (Emphasis added). Plaintiffs also concede that  
15 Universal advised them that a decision to produce a movie based on the Screenplay  
16 was – and is – not final, and that, even if Universal were to eventually decide to  
17 develop a motion picture based on the Screenplay, it would “deviate significantly  
18 from its current iteration.” *See* Compl. ¶ 8.

19 Notwithstanding these representations, Plaintiffs’ claims against Universal  
20 are based entirely on the unfounded supposition that any future works that are  
21 “derived” from the Screenplay would necessarily infringe the Bond Works.  
22 However, even if a future Universal script were somehow “derived from” the Berg  
23 Screenplay, it would not constitute an actionable “derivative work” that infringed  
24 the Bond Works unless it appropriated protected expression from those works. If,  
25 instead, the revised screenplay were based solely on original elements of the Berg  
26 Screenplay, the fact that it may arguably be “derived from” that Screenplay or even  
27 from the Bond Works is irrelevant. In this regard, “[t]he term ‘derivative work’  
28 must not be taken literally. . . If there is no copying of copyrighted material, the fact

1 that a work derived from, in the sense of being inspired or suggested by, a previous  
2 work does not make the second work an infringement of the first.” W. Landes & R.  
3 Posner, *The Economic Structure of Intellectual Property Law* 109 (2003). *See also*  
4 *Bucklew v. Hawkins, Ash, Baptie & Co., LLP.*, 329 F.3d 923, 930 (7th Cir. 2003)  
5 (“In some cases a work, though derivative in a literal sense, is so utterly  
6 transformed as to bear no traces of the original; and then there is no infringement”).

7 Accordingly, for purposes of the Copyright Act, “[a] work is not derivative  
8 unless it has *substantially* copied from a prior work.” 1 M. Nimmer & D. Nimmer,  
9 *Nimmer on Copyright* (“Nimmer”), § 3.01 at 3-3. The Ninth Circuit has held that  
10 “[a] work will be considered a derivative work *only if it would be considered an*  
11 *infringing* work if the material which it has derived from a prior work had been  
12 taken without the consent of a copyright proprietor of such work.” *Litchfield v.*  
13 *Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984) (citation omitted; emphasis in  
14 original). Without seeing the revised screenplays, which have not yet been written,  
15 it is simply impossible to determine whether they “substantially copied from a prior  
16 work.” As such, any claims based on yet-to-exist works are premature and not ripe  
17 for adjudication.

18 A federal court will “not resolve issues involving contingent future events  
19 that may not occur as anticipated, or indeed may not occur at all.” *Clinton v.*  
20 *Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1996) (internal quotation marks and  
21 alteration omitted). “The basic rationale of Article III ripeness doctrine is to  
22 prevent courts, through avoidance of premature adjudication, from entangling  
23 themselves in abstract disagreements.” *Id* (internal quotation marks omitted).  
24 Accordingly, “[b]efore a case is justiciable in federal court, it must be alleged that  
25 the plaintiff is threatened by injury that is both real and immediate, [and] not  
26 conjectural or hypothetical.” *Portland Police Ass’n. v. City of Portland*, 658 F.2d  
27 1272, 1273 (9th Cir. 1981) (internal quotation marks omitted). “Without such  
28 immediacy and certainty of injury the dispute is not ripe; it has not matured



1 sufficiently to warrant judicial intervention.” *Id* (internal quotation marks omitted).

2 In analogous cases seeking declaratory relief, courts have dismissed  
 3 copyright claims as premature unless a party seeking relief can establish that the  
 4 potentially infringing work “presented to the court is the same product which will  
 5 be produced if a declaration of noninfringement is obtained.” *Sierra Applied Scis.,*  
 6 *Inc. v. Advanced Energy Indus., Inc.*, 363 F. 3d 1361, 1379 (Fed. Cir. 2004)  
 7 (internal quotation marks omitted); *see Int’l Harvester Co. v. Deere & Co.*, 623  
 8 F.2d 1207, 1216 (7th Cir. 1980) (“Our concern is not that the [product at issue] will  
 9 never be produced, but rather that because of the relatively early stage of its  
 10 development, the design which is before us now may not be the design which is  
 11 ultimately produced and marketed.”).

12 Here, Plaintiffs’ direct infringement claim against Universal is based entirely  
 13 on conjecture about allegedly infringing works that do not yet exist (and which  
 14 Universal has represented will “deviate significantly” from the Screenplay when  
 15 they do exist). To determine whether there is substantial similarity between the  
 16 copyrighted work and the allegedly infringing work, a court must be able to  
 17 compare the two works. *See, e.g., Funky Films, Inc. v. Time Warner Entm’t Co.*,  
 18 462 F.3d 1072, 1076 (9th Cir. 2006). Plaintiffs’ novel theory of infringement,  
 19 completely unsupported by case law, asks the Court to disregard this requirement  
 20 and to speculate as to whether yet-to-be-created works might contain infringing  
 21 content. Such speculation would be unfounded and premature, and could not  
 22 support a claim of infringement.

### 23 24 **3. Allegations Based Solely on “Information and Belief” Are** 25 **Insufficient.**

26 Finally, Plaintiffs’ allegations of direct infringement are utterly devoid of  
 27 supporting facts, and instead based entirely “on information and belief.” *See*  
 28 *Compl.* ¶ 69. Yet, “[i]n the post-*Twombly* and *Iqbal* era, pleading on information

1 and belief, without more, is insufficient to survive a motion to dismiss for failure to  
 2 state a claim.” *Solis v. City of Fresno*, 2012 WL 868681, at \*8 (E.D. Cal. Mar. 13,  
 3 2012); *see Vivendi SA v. T-Mobile USA Inc.*, 586 F.3d 689, 694 (9th Cir. 2009)  
 4 (finding insufficient allegations based “upon information and belief” where no  
 5 further facts were alleged); *Simonyan v. Ally Fin. Inc.*, 2013 WL 45453, at \*2 (C.D.  
 6 Cal. Jan 3, 2013) (noting that “factual allegations . . . based on ‘information and  
 7 belief’ and contain[ing] nothing more than a rote recitation of the required elements  
 8 of each respective claim . . . fall well short of the requirements set forth in *Iqbal*.”)

9 For example, in *Richtek Tech. Corp. v. UPI Semiconductor Corp.*, plaintiff  
 10 alleged: “Upon information and belief, Defendants . . . have made unauthorized  
 11 copies, prepared derivative works and distributed copies of [Plaintiff’s] copyright  
 12 works . . . all without [Plaintiff’s] permission.” 2011 WL 166198, at \*3 (N.D. Cal.  
 13 Jan. 18, 2011). The complaint made “only conclusory statements, reciting the  
 14 statutory acts that constitute copyright infringement without providing any factual  
 15 allegations to identify [Defendants’] allegedly infringing acts or works.” *Id.*  
 16 Granting defendants’ motion to dismiss, the court explained:

17 [Plaintiff’s] argument that these paragraphs put  
 18 [Defendants] on notice of its copyright infringement  
 19 contentions is laughable. . . . [T]hese paragraphs do not  
 20 identify even a category of works or acts by [Plaintiff]  
 21 accused of infringement. Bald recitations of legal  
 22 conclusion like those contained in these paragraphs do not  
 23 state a claim upon which relief can be granted.

24 *Id.*

25 Like the plaintiff in *Richtek*, Plaintiffs allege on “information and belief” that  
 26 Universal made unauthorized copies, prepared derivative works and distributed  
 27 copies” of the copyrighted work. Compl. ¶¶ 44-46, 69. As in *Richtek*, such “[b]ald  
 28 recitations of legal conclusion” should be dismissed.

1 In sum, Plaintiffs cannot state a claim for direct infringement against  
 2 Universal because: (a) Universal did not play any role in the creation of the original  
 3 Screenplay; (b) no revised Screenplay or motion picture even exists, let alone  
 4 infringes Plaintiffs' works; and (c) conclusory allegations based on solely on  
 5 information and belief are insufficient to survive a motion to dismiss.

6  
 7 **B. The Complaint Does Not State Claims for Secondary Liability**  
 8 **Against Universal.**

9 Plaintiffs purport to allege that Universal: (a) contributorily infringed their  
 10 claimed copyrights; (b) committed acts amounting to vicarious infringement; and  
 11 (c) induced copyright infringement. Each of these allegations is a variant on  
 12 secondary liability. Regardless of the particular theory, secondary liability requires  
 13 an underlying direct act of infringement. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508  
 14 F.3d 1146, 1169 (9th Cir. 2007). Here, for the reasons discussed in Section A.,  
 15 above, there is no viable pleading of direct infringement.<sup>2</sup> Plaintiffs' secondary  
 16 liability claims also fail because they rest on legal conclusions, not factual  
 17 averments of Universal's actual conduct.

18  
 19 **1. The Complaint Fails to State a Claim for Contributory**  
 20 **Infringement Because Plaintiffs Do Not Factually Allege that**  
 21 **Universal Encouraged or Assisted the Allegedly Infringing**  
 22 **Conduct.**

23 Plaintiffs conclusorily allege that, "on information and belief," Universal  
 24

25 <sup>2</sup> In addition, if the court grants the motion to dismiss filed by Berg (on the grounds  
 26 that there is no substantial similarity between his work and Plaintiffs' work as a  
 27 matter of law), this lack of underlying direct liability should also result in the  
 28 dismissal of Plaintiffs' secondary liability claims against Universal. Therefore,  
 even if Plaintiffs' conclusory and hypothetical allegations stated a claim against  
 Universal, Universal cannot be held liable for direct infringement because even the  
 soon-to-be superseded first draft Screenplay is not infringing.

1 “contributed to the unauthorized preparation, duplication, and distribution of the  
 2 *Section 6* screenplay and all *revised versions of the Section 6* screenplay, and is  
 3 continuing to do so.” Compl. ¶ 76 (emphasis added). In other words, although the  
 4 Complaint contains no factual averments of Universal’s supposedly infringing acts,  
 5 Plaintiffs purport to allege infringement by Universal in connection with: (1) the  
 6 Screenplay and (2) revisions to the Screenplay.

7 “Liability for contributory copyright infringement attaches if the  
 8 [Defendants] (1) knew of the direct infringement; and (2) they either induced,  
 9 caused, or materially contributed to the infringing conduct.” *Luvdarts, LLC v.*  
 10 *AT&T Mobility, LLC*, 710 F.3d 1068, 1072 (9th Cir. 2013). The second prong of  
 11 this test requires that a defendant’s “participation [in the infringement] be  
 12 substantial.” *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs.*, 907 F.Supp.  
 13 1361, 1375 (N.D. Cal. 1995); see *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 2004  
 14 WL 1773349, at \*3 (N.D. Cal. Aug. 5, 2004) (“To have materially contributed to  
 15 copyright infringement, ‘the . . . assistance must bear some direct relationship to the  
 16 infringing acts.’”) (quoting 3 Nimmer § 12.04[A][2][a] (2004)). “Put differently,  
 17 liability exists if the defendant engages in personal conduct that encourages or  
 18 assists the infringement.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019  
 19 (9th Cir. 2001) (internal quotation marks omitted). “[T]he purpose . . . is to identify  
 20 the actor (or actors) whose ‘conduct has been so significant and important a cause  
 21 that [he or she] should be legally responsible.’” *Cartoon Network*, 536 F.3d at 132  
 22 (quoting W. Page Keeton et al., *Prosser and Keeton on Torts* § 42, at 273 (5th  
 23 ed.1984)).

24 Universal is not liable for contributory infringement because Plaintiffs do not  
 25 state facts sufficient to show that Universal materially contributed either to the  
 26 Screenplay or to any infringing revisions to the Screenplay.

27 First, the Complaint does not factually allege that Universal materially  
 28 contributed to the Screenplay because, as discussed above, Universal had nothing to

1 do with its authorship. The Complaint alleges that Berg, not Universal, is the  
2 author of the Screenplay. Although Universal acquired the rights to the Screenplay,  
3 Plaintiffs do not and cannot allege that the mere act of acquiring rights to a work  
4 violates any exclusive rights set forth in 17 U.S.C. section 106 or otherwise  
5 contributes materially to its allegedly infringing and already existing content.  
6 Plaintiffs also do not allege any facts indicating that Universal has added or intends  
7 to add *infringing* material to the Screenplay. To the contrary, Plaintiffs concede  
8 that Universal has advised them that: (a) it has not yet approved a movie based on  
9 the Screenplay; (b) if it does approve a movie based on the Screenplay, the movie  
10 would “deviate significantly from its current iteration”; and (c) Universal “has no  
11 intention of violating [Plaintiffs’] rights.” Compl. ¶ 8. Thus, not only did  
12 Universal not contribute to any allegedly infringing content – materially or  
13 otherwise – it also assured Plaintiffs that it would not do so. Universal’s act of  
14 buying rights in the Screenplay with the intent to change it, simply cannot, as a  
15 policy matter, constitute contributory infringement. To the contrary, Universal  
16 should be *encouraged* to make changes to a work that Plaintiffs might otherwise  
17 regard as infringing. *Warner Bros.*, 720 F.2d at 241.

18 Second, the Complaint does not allege that Universal materially contributed  
19 to the allegedly infringing revisions to the Screenplay because it is not averred that  
20 any infringing revisions exist. As discussed above, a claim of infringement,  
21 whether direct or contributory, cannot withstand a motion to dismiss absent the  
22 existence of an infringing work. As with their direct infringement claim, Plaintiffs’  
23 allegations are devoid of factual support and instead based entirely on “information  
24 and belief.” Courts have dismissed contributory infringement claims based on  
25 similarly threadbare allegations. *See Luvdarts*, 710 F.3d at 1072 (dismissing  
26 contributory infringement claim based on conclusory allegations); *Med-Systems,*  
27 *Inc. v. Masterson Mktg., Inc.*, 2011 WL 5873399, at \*7 (S.D. Cal. Nov. 23, 2011)  
28 (dismissing contributory infringement claim and holding that, under *Iqbal*, a court

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1 need not accept as true plaintiff’s conclusory allegations and legal conclusions).

2 Plaintiffs allege only that it is “likely” that Universal has “contracted and/or  
3 authorized writers (including defendant Berg) to revise and/or assist in revising the  
4 *Section 6* screenplay.” *See* Compl. ¶ 45 (emphasis added). However, it in no way  
5 follows from the fact that the Screenplay is being revised that such revisions would  
6 be infringing. Like its claim for direct infringement, Plaintiffs’ claim for  
7 contributory infringement cannot stand.

8

9 **2. The Complaint Fails to State a Claim for Vicarious**  
10 **Infringement Because Plaintiffs Do Not Factually Allege that**  
11 **Universal Declined to Exercise Any Right to Stop or Limit**  
12 **the Alleged Infringement.**

13 Plaintiffs allege:

14 On information and belief, since acquiring the rights to  
15 the *Section 6* screenplay, Universal has had the legal right and  
16 ability to supervise the preparation, duplication, and distribution  
17 of the *Section 6* screenplay and *all revised versions of the*  
18 *Section 6* screenplay.

19 In direct violation of plaintiffs’ exclusive rights,  
20 defendants have vicariously infringed and, unless enjoined by  
21 this Court, will continue to vicariously infringe the copyrights in  
22 the Copyrighted Bond Works.

23 Compl. ¶¶ 84-85 (emphasis added). Plaintiffs’ allegations of infringement again  
24 focus on conclusory speculation regarding Universal’s conduct related to: (1) the  
25 Screenplay and (2) revised versions of the Screenplay.

26 A defendant may be liable under a vicarious infringement theory “by  
27 profiting from direct infringement while declining to exercise a right to stop or limit  
28 it.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930

1 (2005). To prove vicarious infringement, Plaintiff must show: (1) that Defendants  
2 enjoy a direct financial benefit from the infringement, and (2) that Defendants have  
3 declined to exercise the right and ability to supervise or control that infringing  
4 activity. *See Ellison v. Robertson*, 357 F.3d 1072, 1078 (9th Cir. 2004); *Perfect 10,*  
5 *Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1169 (9th Cir. 2007).

6 Plaintiffs' allegations, once again made solely on "information and belief,"  
7 simply restate the legal elements of the claim. *See Iqbal*, 556 U.S. at 678  
8 ("Threadbare recitals of the elements of a cause of action, supported by mere  
9 conclusory statements, do not suffice.").

10 Plaintiffs have alleged no facts sufficient to support the conclusion that  
11 Universal declined to exercise any right to stop or limit directly infringing conduct  
12 related either to the Screenplay or revised versions of the Screenplay, nor can they.

13 First, Universal is not factually alleged to have declined to exercise its right  
14 to stop or limit the allegedly infringing content contained in Berg's Screenplay  
15 because it is not factually alleged that Universal had any such right. As discussed  
16 above, Plaintiffs acknowledge that Universal played no role in the creation of that  
17 Screenplay. Without such input, Universal lacked the ability to limit or remove the  
18 allegedly infringing characters, dialogue, plot elements and themes at issue prior to  
19 their insertion into the Screenplay.

20 Second, Plaintiffs do not and cannot allege facts supporting their conclusion  
21 that Universal declined to exercise its right to stop or limit allegedly infringing  
22 content contained in revised versions of the Screenplay. As discussed above, no  
23 such versions yet exist. Until a revised Screenplay exists, allegations that the  
24 contents of the revised Screenplay infringe Plaintiffs' copyright – or that Plaintiffs  
25 did not limit or stop such allegedly infringing activity – are speculative and  
26 premature.

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1                   **3. The Complaint Fails to State a Claim that Universal is**  
2                   **Liable for Inducement Because Plaintiffs Do Not Factually**  
3                   **Allege that Universal Took Active Steps to Encourage**  
4                   **Infringement.**

5                   Plaintiffs allege:

6                               On information and belief, Universal has taken active  
7                               steps to encourage infringement of the Copyrighted Bond  
8                               Works.

9                               On information and belief, Universal’s encouragement  
10                              has caused third parties to infringe the Copyrighted Bond  
11                              Works.

12                   Compl. ¶¶ 91-92.

13                               Liability for inducement “has four elements: (1) the distribution of a device  
14                               or product, (2) acts of infringement, (3) an object of promoting its use to infringe  
15                               copyright, and (4) causation.” *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d  
16                               1020, 1032 (9th Cir. 2013). This inducement rule “premises liability on purposeful,  
17                               culpable expression and conduct, and thus does nothing to compromise legitimate  
18                               commerce or discourage innovation having a lawful promise.” *Grokster*, 545 U.S.  
19                               at 937. As such, there must be “[e]vidence of active steps . . . taken to encourage  
20                               direct infringement, such as advertising an infringing use or instructing how to  
21                               engage in an infringing use.” *Id.* at 936 (internal quotation marks and citation  
22                               omitted). “Thus, courts generally find liability for inducement where one actively  
23                               and knowingly aid[s] and abet[s] another’s direct infringement.” *Bangkok Broad.*  
24                               *& T.V. Co. v. IPTV Corp.*, 742 F. Supp. 2d 1101, 1118 (C.D. Cal. 2010) (internal  
25                               quotation marks omitted) (alterations in original).

26                               Once again, Plaintiffs’ complaint merely restates, in conclusory fashion and  
27                               on information and belief, that Universal induced infringing acts. However,  
28                               Plaintiffs have not alleged any facts to support the legal conclusion that Universal



1 took “active steps” to encourage the alleged direct infringement.

2 First, Plaintiffs do not factually allege that Universal encouraged or  
 3 otherwise induced Berg to write the Screenplay. Rather, as Plaintiffs acknowledge,  
 4 Berg wrote the Screenplay on his own without any input from Universal, and then  
 5 shopped the Screenplay to a number of studios, including Universal. *See* Compl. ¶¶  
 6 2, 24, 36, 39. Thus, Universal’s role in the creation of the Screenplay was, by  
 7 Plaintiffs’ admission, not only not “active,” but nonexistent. Universal’s conduct  
 8 was no different from that of the other studios to which the script was sent, other  
 9 than the fact that Universal acquired rights in the Screenplay with the intent to  
 10 revise it.

11 Second, Plaintiffs do not allege that, after acquiring rights to the Screenplay,  
 12 Universal acted with the requisite “purposeful, culpable expression and conduct.”  
 13 To the contrary, Plaintiffs acknowledged that Universal advised them that: (a) if it  
 14 elected to develop a motion picture based on the Screenplay, the picture would  
 15 “deviate significantly from its current iteration” and (b) it “has no intention of  
 16 violating [Plaintiffs’] rights.” Compl. ¶ 8. These representations make clear that,  
 17 not only did Universal not act with culpable purpose, but that it has confirmed that  
 18 it will take care to ensure that any derivative work based on the Screenplay does not  
 19 infringe Plaintiffs’ copyrights.

## 21 **V. CONCLUSION**


22 To the extent Plaintiffs’ claims against Universal are based on the  
 23 Screenplay, they fail because the Complaint does not allege that Universal played  
 24 no role in authoring or otherwise contributing to the Screenplay, and the Screenplay  
 25 is not substantially similar to protectable expression in the Bond Works in any  
 26 event. To the extent Plaintiffs’ claims are based on revised drafts or a final film –  
 27 works that have not been, and may never be, created – their claims fail because they  
 28 are based on sheer speculation about what might be contained in hypothetical future

1 works. In either event, Plaintiffs' complaint fails to state a claim against Universal  
2 for infringement – direct or secondary – and should be dismissed.

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