

Appeal Nos. 11-55863, 11-56034

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

LAURA SIEGEL LARSON,
Plaintiff, Counterclaim-Defendant, Appellant, and Cross-Appellee,

v.

WARNER BROS. ENTERTAINMENT INC. AND DC COMICS,
Defendants, Counterclaimants, Appellees, and Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
THE HONORABLE OTIS D. WRIGHT II, JUDGE
CASE NO. CV-04-8400 ODW (RZX)

**MOTION BY CROSS-APPELLANTS AND APPELLEES
WARNER BROS. ENTERTAINMENT INC. AND DC COMICS
FOR ASSIGNMENT TO A SPECIFIC PANEL;
DECLARATION OF CASSANDRA SETO IN SUPPORT THEREOF**

JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
Telephone: (202) 383-5300

PATRICK T. PERKINS
PERKINS LAW OFFICE, P.C.
1711 Route 9D
Cold Spring, New York 10516
Telephone: (845) 265-2820

DANIEL M. PETROCELLI
MATTHEW T. KLINE
CASSANDRA L. SETO
O'MELVENY & MYERS LLP
1999 Avenue of the Stars, 7th Floor
Los Angeles, California 90067
Telephone: (310) 553-6700
Facsimile: (310) 246-6779

Attorneys for Warner Bros. Entertainment Inc. and DC Comics

There are two related Superman cases in the court below that have given rise to four interlocutory proceedings currently pending before this Court:

- *Larson v. Warner Bros. Entm't Inc. & DC Comics*, Case No. CV-04-8400 ODW (“*Larson*”), gives rise to (1) Laura Larson’s instant appeal, Appeal No. 11-55863; and (2) DC’s cross-appeal, Appeal No. 11-56034; and
- *DC Comics v. Pacific Pictures et al.*, Case No. CV-10-3633 ODW (“*Pacific Pictures*”), gives rise to (3) a petition for a writ of mandamus, Appeal No. 11-71844, that the Court heard on February 7, 2012 (Kozinski, C.J.; O’Scannlain, J.; Smith, J.); and (4) another interlocutory appeal brought by Larson’s co-defendants in *Pacific Pictures*, Appeal No. 11-56934.

As their Statements of Related Cases confirm, the parties agree that all four appellate proceedings are related. Larson and her co-defendants in *Pacific Pictures*, nonetheless, will not state whether they oppose DC’s request to have one panel of this Court hear all four cases—even though this Court regularly provides for such a procedure and it is the most efficient route here. Just as one district court judge has heard the underlying, related cases below, these four proceedings should all be heard by the same appellate panel.

1. Assignment to a specific panel is warranted where the panel previously considered “a ‘related’ case or one involving *some* of the same parties and issues.”

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CIRCUIT CIVIL APPELLATE PRACTICE §9:53 (Rutter 2011); *see id.* §6:171. “Cases identified by the parties as ‘related’ in their briefs are generally calendared before the same panel.” *Id.* §9:59; *see also* Ninth Circuit Rules §(E)(4) (discussing motions to assign cases to the same panel); *e.g.*, *In re: Exxon Valdez*, Appeal No. 07-35715, Docket No. 9 (granting motion for assignment to same panel).

2. All four appellate proceedings involve Superman-related rights. All four proceedings involve the same two parties on opposite sides of the dispute—DC and Larson. All four proceedings involve many of the same witnesses, including Marc Toberoff—a movie producer and Larson’s business partner, who became Larson’s lawyer as well—and his entertainment companies (all co-defendants with Larson in *Pacific Pictures*).

The case giving rise to the *Larson* appeals has been pending for well over seven years. Every effort should be made to resolve it expeditiously, including empaneling judges familiar with the interrelated Superman litigations. Larson seeks to recapture copyrights in early Superman works under the Copyright Act’s termination provisions. As DC has argued from the beginning, and as set forth in its merits brief filed today, Larson entered into a settlement agreement with DC in 2001 that bars her termination claims and her lawsuit. DC Merits Br. at 25-37.

DC contends in *Pacific Pictures* that due to Toberoff’s acts of business interference, Larson wrongly repudiated her settlement with DC in favor of a new

business deal with Toberoff and his company. Toberoff and his entertainment company co-defendants moved to strike several of DC's state-law claims in *Pacific Pictures* under California's anti-SLAPP statute, but the district court denied that motion, Appeal No. 11-71844, Docket No. 16, and defendants appeal that ruling. Appeal No. 11-56934.

The writ petition this Court heard in *Pacific Pictures* on February 7, 2012, involves related issues as well. Indeed, Toberoff and his co-defendants spend some 10 pages of their writ briefs discussing their SLAPP motion, the *Larson* case, and their contention that Toberoff never interfered with Larson's binding settlement agreement with DC. Moreover, the writ proceeding involves a discovery order requiring defendants to produce documents that have a direct bearing on both *Larson* and *Pacific Pictures*, including evidence that a key witness, Kevin Marks, confirmed with Larson that she had reached a settlement agreement with DC. DC Merits Br. 37; *see* Decl. of Cassandra Seto Ex. A at 8.

3. Assignment to one panel is also appropriate given the need for prompt resolution of these cases. Larson, an heir of Superman co-creator Jerry Siegel, asserts that she recaptured a 50% share in certain early Superman works as of 1999. The heirs of Superman co-creator Joe Shuster, whose claims are also at issue in *Pacific Pictures*, assert that, as of October 26, 2013, they will recapture the other 50%. While DC contends that the Siegel and Shuster heirs' termination

notices are invalid—including because of Toberoff’s acts of interference—the uncertainty created by such unresolved claims has put a cloud over the Superman property. Toberoff himself asserts that the terminations will put DC out of the Superman business: “After 2013, Time Warner [DC’s ultimate parent company] couldn’t exploit any new Superman-derived works without a license from the Siegels and Shusters.” Michael Cieply, *Creator’s Family Reclaims the Rights to Superman*, N.Y. TIMES, Mar. 29, 2008 (quoting Toberoff).

4. Finally, DC’s lead argument in the *Larson* cross-appeal is that this Court should enter judgment in DC’s favor as a matter of law on the ground that Larson is bound by her 2001 settlement agreement with DC. DC Merits Br. 25-34. At minimum, DC asserts that a jury trial on DC’s settlement claim is required. *Id.* 34-37. If a trial is to be had, this appeal should be remanded to the district court as soon as possible so that district court may set an appropriate schedule and procedure to resolve the *Larson* and *Pacific Pictures* cases fully and expeditiously.

For the foregoing reasons, DC’s motion for assignment should be granted. DC asked Ms. Larson whether she would oppose this motion, and her counsel responded: “[W]e reserve comment until we see the filed motion.”

Dated: March 23, 2012

O’MELVENY & MYERS LLP

By: /s/ Daniel M. Petrocelli
Daniel M. Petrocelli

DECLARATION OF CASSANDRA SETO

I, Cassandra Seto, declare and state as follows:

1. I am an attorney licensed to practice in the State of California and admitted to the Ninth Circuit. I am a counsel at O'Melveny & Myers LLP, counsel of record for DC in the above-entitled action. I make this declaration in support of DC's Motion For Assignment To A Specific Panel. I have personal knowledge of the matters set forth in this declaration.

2. Attached hereto as Exhibit A is a true and correct copy of DC's Notice Of Motion And Motion For Review Of Magistrate's Order On Plaintiff's Motion To Compel Production Of Documents Pursuant To Fed. R. Civ. P. 72(a) And L.R. 72-2.1, filed with the United States District Court for the Central District of California on February 27, 2012, in Case No. CV 10-03633 ODW (RZx) (denied on March 21, 2012).

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on March 23, 2012.

Dated: March 23, 2012

/s/ Cassandra Seto

Cassandra Seto