

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 LEAVE TO LODGE AN
ORIGINAL *DETECTIVE COMICS #15* IN THE APPELLATE RECORD**

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Cross-appellants and appellees Warner Bros. Entertainment Inc. and DC Comics (collectively, “DC”) respectfully seek leave of this Court to lodge an original *Detective Comics #15* comic book, cover-dated May 1938, in the appellate record. The comic book, which is one of about 20 originals known to exist, is encased in plastic and valuable. DC would ask the Court to keep the book protected, as best it can.

The comic book is self-authenticating and subject to judicial notice. *See* FED. R. EVID. 201(b), 902(6); *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (judicial notice appropriate where “neither party disputes the authenticity” of evidence); *Valdivia v. Schwarzenegger*, 599 F.3d 984, 994 (9th Cir. 2010) (same); *Hotel Employees & Rest. Employees Union, Local 100 v. City of New York Dep't of Parks & Recreation*, 311 F.3d 534, 540 n.1 (2d Cir. 2002) (taking judicial notice of facts in “authoritative text”); *Fitzgerald v. Penthouse Intern., Ltd.*, 525 F.Supp. 585, 595 n.41 (D. Md. 1981) (taking judicial notice of article’s publication); *Assoc. of Irritated Residents v. Fred Schakel Dairy*, 2008 WL 850136, *4 (E.D. Cal. Mar. 28, 2008) (self-authenticating documents “proper for judicial notice”).

The inside front cover of *Detective Comics #15* contains an original printing of one of the works at issue in this cross-appeal: a “Promotional Announcement” of Superman that DC published on April 10, 1938, eight days before it published

the first full Superman story in *Action Comics #1*. ER-152-53. The district court correctly ruled that *DC* owned the rights in this and other Promotional Announcements of Superman, and that appellant Laura Siegel Larson had not recaptured the Announcements pursuant to the Copyright Act's termination provisions. ER-180-81. Larson does not appeal this ruling that DC owns the Promotional Announcement.

DC, however, cross-appeals the district court's *sua sponte* ruling that several key Superman elements, including the "S" on Superman's chest, are not visible in the Promotional Announcements. DC Merits Br. 12, 20-21, 80-86. The district court made this ruling without the issue being raised on summary judgment or briefed, and without actually reviewing an original Promotional Announcement or legible copy of an Announcement, but rather by looking only at a multiple-generation photocopy that obscured the image. *Id.*; SER-44-45. Indeed, the district court made this ruling even though Larson and her putative expert witness both argued that the "contents" of the Promotional Announcement was a "classic issue[] of fact, precluding summary judgment." SER-356-57, 370.

DC seeks to provide the Court with an original version of the Announcement for completeness and accuracy in reviewing the district court's decision. *Cf. U.S. v. Rivero*, 532 F.2d 450, 458 (5th Cir. 1976) (appellate court may take judicial notice of evidence outside the record "where necessary either to affirm, or to show

the impropriety of, a decision below'") (quoting *Am. Legion Post No. 90 of Vill. of Mamorneck v. First Nat'l Bank & Trust Co.*, 113 F.2d 868, 872 (2d Cir. 1940)).

For the foregoing reasons, DC's motion should be granted.

DC notified Larson's counsel of its intent to file this motion. Counsel advised that Larson opposes the motion, but declined to provide the reasons why.

Dated: March 23, 2012

O'MELVENY & MYERS LLP

By: /s/ Daniel M. Petrocelli

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