

APPELLATE CASE NO. 11-55863
CROSS-APPEAL CASE NO. 11-56034
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

WARNER BROS. ENTERTAINMENT INC., DC COMICS
Defendants, Counterclaimants, and Appellees.

**APPELLANT LAURA SIEGEL LARSON'S RESPONSE TO CROSS-APPELLANT AND
APPELLEES WARNER BROS. ENTERTAINMENT INC. AND DC COMICS' MOTION
FOR ASSIGNMENT TO A SPECIFIC PANEL**

Appeal From The United States District Court for the Central District of
California,
Case No. CV-04-08400 ODW (RZx), Hon. Otis D. Wright II

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Plaintiff-Appellant Laura Siegel Larson (“Appellant” or “Larson”) hereby responds to Warner Bros. Entertainment Inc. and DC Comics’ (“DC,” collectively “Warner”) Motion for Assignment to Specific Panel (“Motion”; Docket No. 29-1).

BACKGROUND

Warner seeks to have the same panel decide (1) the instant appeal (Appeal No. 11-55863) and cross-appeal (Appeal No. 11-56034) concerning issues of copyright law in *Laura Siegel Larson v. Warner Bros. Entertainment Inc.*, C.D. Cal. Case No. 04-08400 ODW (RZx) (the “*Siegel Copyright Appeals*”); (2) the appeal of the district court’s denial of an Anti-SLAPP motion (Appeal No. 11-56934; the “*PPC Anti-SLAPP Appeal*”) in another case, *DC Comics v. Pacific Pictures*, C.D. Cal. Case No. 10-CV-03633 ODW (RZx) (“*Pacific Pictures*”), DC’s retaliatory lawsuit against their long-time opposing counsel, Marc Toberoff; and (3) the writ proceeding involving a narrow privilege issue in *Pacific Pictures* discovery (Appeal No. 11-71844; the “*PPC Discovery Writ*”). Appellee Warner Bros. Entertainment Inc. is not a party to *Pacific Pictures*, which involves six defendants who are not parties to the *Siegel Copyright Appeals*.

The *PPC Discovery Writ Appeal* is fully-briefed, oral argument was held on February 7, 2012, and it is currently under submission. No briefs have yet been filed in the *PPC Anti-SLAPP Appeal*, and briefing has yet to be completed in the *Siegel Copyright Appeals*.

ARGUMENT

The decision to assign a panel is, of course, within the Court's ample discretion. However, Warner's claim that "the most efficient route here" (Motion at 1) is for the same panel to hear each of these very different appeals is erroneous.

1. The Same Panel Hearing All Four Appeals Will Not Result In Efficiency Gains

The *Siegel* Copyright Appeals center on the "work for hire" doctrine under the 1909 Copyright Act, the statute of limitations for declaratory relief under the Copyright Act, and whether Appellant and Warner reached a binding settlement agreement, despite disagreement on numerous material terms.

The *PPC* Discovery Writ is focused on one novel, discrete discovery issue: whether a victim's disclosure of stolen privileged documents to the U.S. Attorney's Office, which needed to review the documents as part of its investigation, effects a waiver of privilege in the stolen documents, thereby accomplishing the criminal's objectives.

The *PPC* Anti-SLAPP Appeal is focused on whether DC's state-law tortious interference and unfair competition claims in DC's retaliatory *Pacific Pictures* lawsuit arise from protected petition activity within the scope of California's Anti-SLAPP statute, and are barred by defenses such as the statute of limitations and

litigation privilege.¹

There is virtually no overlap between the *Siegel* Copyright Appeals and the *PPC* Discovery Writ, which concerns a discrete issue of federal privilege law. Similarly, the legal issues in the *PPC* Anti-SLAPP Appeal have little if anything to do with the legal issues in the *Siegel* Copyright Appeals.

Given the almost-entirely separate issues presented, there do not appear to be any real efficiency gains from having the same panel hear all four appeals. If anything, such a step is likely to delay resolution of both the *PPC* Anti-SLAPP Appeal and the *Siegel* Copyright Appeals, as a single panel would be faced with resolving multiple issues that do not overlap.

Notably, this Court has no established practice of consolidating appeals from separate district court cases with a writ proceeding in a discovery matter. Warner's reliance on *In re: Exxon Valdez*, Appeal No. 07-25715 is misplaced: *Exxon* involved a motion to consolidate two related appeals which, unlike here, "involve[d] identical parties, common facts, and the same ultimate issue." (Appeal No. 07-35715, Docket No. 60 at 4).

¹ Warner attaches a failed *motion* for review (Docket No. 29-2) that DC filed in the other case, *Pacific Pictures*, as supposed "evidence" that Larson "had reached a settlement agreement with DC." Mot. at 3. Warner signally fails to attach defendants' opposition, rebutting Warner's false contention, and both the magistrate judge's and the district court's *denial* of DC's contentions. See Case No. 10-CV-03633 ODW (RZx), Docket Nos. 378, 386, 389.

2. Warner Omits That Another Panel Addressed Prior Appeals In The *Pacific Pictures* Case

Warner, whose motion is purportedly based on efficiency concerns, omits that a Ninth Circuit panel has already considered appeals of the district court's denial of an earlier anti-SLAPP motion and a subsequent one-sided discovery stay in *Pacific Pictures*. See Appeal Nos. 10-56594, 10-56980, 10-73851. In those appeals, unlike the *PPC* Writ Appeal, there was extensive briefing as to historical background, Superman's creation by Siegel and Shuster, the acrimonious relationship between Warner, Siegel and Shuster, the procedural background of the *Siegel* case, the failed 2001-02 negotiations between the Siegels and Warner, and the purpose and scope of California's Anti-SLAPP law.² After review of this file, the panel declined to exercise jurisdiction. Appeal No. 10-56594, Docket No. 15; Appeal No. 10-73851, Docket No. 13.

Due to the differences between the issues presented in the *PPC* Discovery Writ and the *PPC* Anti-SLAPP Appeal, none of the parties in either appeal argued that efficiency would be enhanced by referring such appeals to the prior panel even

² See, e.g., Appeal No. 10-56594 at Docket No. 5-1 at 4-10 (factual/procedural background), 10-19 (Anti-SLAPP); No. 7-1 at 3-7 (factual/procedural background); Appeal No. 10-73851 at Docket No. 1-3 at 4-12 (factual/procedural background), 20-25 (Anti-SLAPP); No. 5-1 at 3-9 (factual/procedural background), 11-15 (Anti-SLAPP); No. 6-1 at 4-11 (factual/procedural background), 14-17 (Anti-SLAPP); No. 7 (DC's filing of 1,200 pages of exhibits).

though such appeals were in the same case. That Warner does not even mention this is telling. If Warner truly sought the “empaneling [of] judges familiar with the interrelated Superman litigations” (Mot. at 2), it would, at a minimum, have disclosed to the Court this relevant background of prior appeals.

3. Warner’s Request Would Needlessly Complicate And Prejudice Appellants, Both Here And In The PPC Anti-SLAPP Appeal

Combining the relatively straightforward *PPC* Anti-SLAPP Appeal with the far more lengthier and complex *Siegel* Copyright Appeals will prejudice appellants in the *PPC* Anti-SLAPP Appeal by, in all likelihood, delaying its resolution. As just a rough indication, the complicated issues in *Siegel v. Warner Bros. Ent. Inc.*, gave rise to a 72-page opinion (542 F. Supp. 2d 1098 (C.D. Cal. 2008)), a 92-page opinion (658 F. Supp. 2d 1036 (C.D. Cal. 2009)), and a 41-page opinion (690 F. Supp. 2d 1048 (C.D. Cal. 2009)). Ms. Larson’s appeal in *Siegel* involves detailed “work for hire” issues under the 1909 Copyright Act regarding hundreds of Superman works, while Warner’s cross-appeal focuses on purported defenses to her statutory termination notices, involving a dense record. For instance, Warner’s purported settlement defense alone requires detailed analysis of the differences in numerous material deal terms characterizing the parties’ protracted exchange of counter-offers regarding Superman’s exploitation across multiple media.

It makes little sense to merge such determinations with the *PPC* Anti-

SLAPP Appeal of a seven-page order (Case No. 10-3633, Docket No. 337) that lends itself to more expeditious resolution. California law encourages the prompt resolution of Anti-SLAPP issues because the claims that give rise to them are against public policy. Cal. C. Civ. Proc. §§ 425.16(a),(f),(i). Warner's scorched earth tactic in *Pacific Pictures* of attacking its opposing counsel with baseless state-law "interference" claims aimed at the exercise of his clients' statutory rights is a quintessential strategic lawsuit against public participation ("SLAPP").

By its motion, Warner attempts to imbue the *Siegel* Copyright Appeals, involving genuine copyright issues of considerable legal import and public interest, with Warner's *ad hominem* attacks on its opposing counsel that dominate the *PPC* Anti-SLAPP Appeal and the underlying *Pacific Pictures*' action.

Laura Siegel Larson chose and retained Mr. Toberoff as her counsel and he has successfully represented her in over seven years of litigation with Warner in *Siegel*. Ms. Larson should be free to litigate the validity of her rights under the Copyright Act without the *Pacific Pictures* sideshow, concocted by Warner to derail the merits and leverage its flailing position.

CONCLUSION

The parties seek a swift resolution of all pending matters. Combining these appeals before a single panel will not enhance efficiency, will likely cloud and delay their resolution and is inconsistent with common practice.

Dated: April 5, 2012

TOBEROFF & ASSOCIATES, P.C.

/s/ Marc Toberoff

Marc Toberoff

Attorneys for Appellant, Laura Siegel Larson

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d) and 32(a), I certify that the Appellant Laura Siegel Larson's brief is proportionately spaced, has a typeface of 14 points or more, and does not exceed 20 pages.

Dated: April 5, 2012

TOBEROFF & ASSOCIATES, P.C.

/s/ Marc Toberoff

Marc Toberoff

Attorneys for Appellant, Laura Siegel Larson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served electronically by the Court's ECF system and by first class mail on those parties not registered for ECF pursuant to the rules of this court.

Dated: April 5, 2012

TOBEROFF & ASSOCIATES, P.C.

/s/ Marc Toberoff

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