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 OPPOSITION TO CROSS-APPELLANT AND APPELLEES WARNER BROS. ENTERTAINMENT INC. AND DC COMICS' MOTION TO LODGE AN ORIGINAL *DETECTIVE COMICS #15* IN THE APPELLATE RECORD

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

TOBEROFF & ASSOCIATES, P.C.
Marc Toberoff
mtoberoff@ipwla.com
Keith G. Adams
kgadams@ipwla.com
Pablo D. Arredondo
parredondo@ipwla.com
22337 Pacific Coast Highway #348
Malibu, California 90265
Telephone: (310) 246-3333
Facsimile: (310) 246-3101

Attorneys for Plaintiff-Appellant,
Laura Siegel Larson, individually and
as personal representative of The Estate of
Joanne Siegel

Defendants-Appellees Warner Bros. Entertainment, Inc. and DC Comics' (collectively "Warner") Motion for Leave To Lodge An Original Detective Comics No. 15 In The Appellate Record (Docket No. 30-1; "Motion") should be denied, as it mischaracterizes the record and runs afoul of firmly-established rules governing evidence on appeal.

Warner argues it should be allowed to introduce new evidence on appeal because the district court purportedly issued a *sua sponte* ruling as to the effect of Promotional Announcements or "Ads" contained in *Detective Comics,* No. 15 without reviewing a "legible" copy of them. Motion at 2.

As a preliminary matter, it is clear that the scope of these Promotional Announcements or the Superman literary elements contained therein are not before the Court as such relates to claims which are not part of the Rule 54(b) judgment under appeal, as set forth in appellants' prior briefing here and in the district court. *See, e.g.,* Docket No. 7-1 at 1, 14-15; No. 7-2 at Ex. B at 24-25 ("The 'Ads' Issue Is Not Part of Plaintiff's First Claim"), Ex. G at 122-24.

The district court's ruling as to the scope of the Promotional Announcements was entirely proper, and afforded Warner ample opportunity in its reply to provide any evidence it thought relevant, including the evidence Warner now seeks to introduce for the first time in this unrelated appeal:

> Although defendants originally sought for the Court to determine that the promotional advertisements fell outside the reach of the notices of termination, plaintiffs raised in their opposition to that issue further questions concerning the scope of the copyrightable material contained in those announcements, attaching thereto the expert reports of both sides directed to that particular question. Defendants thereafter filed a response wherein they noted that … with respect to this additional question, 'the ads … speak for themselves' and 'no special 'lens' is required.

Supplemental Excerpts of Record ("DC SER") at 1-2 (emphasis in original). *See Intel Corp. v. Hartford Accident and Indemnity Co.*, 952 F.2d 1551, 1556 (9th Cir. 1991) (upholding district court's grant of summary judgment on sub-issues not explicitly raised by party's motion, but inherently part of the larger issue); *Portsmouth Square Inc. v. Shareholders Protective Committee*, 770 F.2d 866, 869 (9th Cir. 1985) (*sua sponte* grants of summary judgment proper if a party has "a full and fair opportunity to develop and present facts and legal arguments in support of its position" and "reasonable notice that the sufficiency of his or her claim will be in issue").

Warner also falsely states that the district court never reviewed a "legible copy" of the Promotional Announcements. Motion at 2. Warner conspicuously neglects to mention that it filed a motion for reconsideration of the district court's ruling, in which Warner attached high resolution copies and "large blow ups" of the Announcements "almost the size of a small poster." DC SER at 2. The district court reviewed all of these highly legible copies of the Announcements, but this

did not change its conclusions. *Id.* Moreover, the district court specifically noted that Warner had every opportunity to attach the Promotional Announcements "in their actual state" to their briefing on either summary judgment or reconsideration, but declined to do so. *Id.* at 2.

It is well established that a party may not introduce new evidence for the first time on appeal. *See United States v. Kitsap Physicians Serv*., 314 F.3d 995, 999 (9th Cir. 2002) ("[Plaintiff's] urging of this evidence for the first time on appeal cannot create a triable issue of fact because [plaintiff] failed to articulate this evidence to the district court in opposition to the summary judgment motion."); *United States v. Jimenez-Dominguez*, 296 F.3d 863, 870 n.5 (9th Cir. 2002) (a party "must rely upon the existing record and may not attempt to augment the record with new evidence upon appeal").

Warner's sole authority for the proposition that it may submit new evidence on appeal, *United States v. Rivero*, 532 F.2d 450 (5th Cir. 1976), is manifestly inapposite. In *Rivero*, the court took judicial notice of *a legal principle* which had not been brought to the district court's attention. In so doing, the court explicitly noted that this solely regarded a "question of law." *Id.* at 458. Nowhere does *Rivero* hold that a party can introduce new physical evidence for the first time on an appeal, contrary to established law.

Warner's motion should be summarily denied, as Warner cannot introduce on appeal evidence that it opted not to bring into the record below.

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
Marc Toberoff

Attorneys for Appellant, Laura Siegel Larson