

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)

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

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DC’s motion for assignment should be granted. In her opposition, Larson concedes, as she must, that this Court has “ample discretion” to assign related cases to the same panel. Opp. at 3. Nor does she dispute or can she dispute:

- that the Superman cases underlying the appeals before this Court¹ were deemed “related” and transferred to the same district judge below;
- that, pursuant to Circuit Rule 28-2.6, Larson and her co-defendants themselves identified in their briefs each of the cases as “related”; or
- that these cases involve overlapping parties, issues, and evidence.

It would plainly serve the interest of judicial efficiency for one panel to hear these interrelated appeals. GOELZ ET AL., CALIFORNIA PRACTICE GUIDE: FEDERAL NINTH CIRCUIT CIVIL APPELLATE PRACTICE § 9:59 (Rutter 2011) (“Cases *identified by the parties as ‘related’ in their briefs* are generally calendared before the same panel.”) (emphasis added); *id.* § 9:53 (assignment appropriate where panel has considered a case “involving *some* of the same parties and issues”). And because one of the cases has already been extensively briefed, argued, and taken under submission by one panel—Appeal No. 11-71844 (Kozinski, C.J.; O’Scannlain, J.; Smith, J.)—it makes sense for the same panel to consider the remainder of them.

¹ *Larson v. Warner Bros. Entm’t Inc. & DC Comics*, Case No. CV-04-8400 ODW, gave rise to the instant appeal and cross-appeal (Appeal Nos. 11-55863, 11-56034); and *DC Comics v. Pacific Pictures*, Case No. CV-10-3633 ODW, gave rise to defendants’ writ petition (Appeal No. 11-71844) and interlocutory appeal for their failed SLAPP motion (Appeal No. 11-56934).

Larson’s claims that DC’s *Pacific Pictures* case is “retaliatory” or being pursued improperly, Opp. at 1, 6, were not only rejected by the district court below, but its rulings so holding underscore the relatedness of the actions, as they are the subject of the writ petition that this Court just heard and defendants’ SLAPP appeal, which will be briefed in the coming weeks. Larson herself acknowledges that many of DC’s claims in the *Pacific Pictures* case arise from key events at issue in the *Larson* appeal, Opp. at 6—including DC’s allegation that Marc Toberoff, the self-styled entertainment executive, induced Larson to repudiate a binding settlement agreement she reached with DC that bars her copyright claims in the *Larson* case. Compare Appeal Nos. 11-55863, 11-56034, Docket No. 31-1 at 15-19, 25-37 (DC’s merits brief in *Larson* cross-appeal), with Appeal No. 10-56594, Docket No. 7-3 ¶¶ 7-8, 66-85, 180-86 & n.6 (DC’s operative complaint in *Pacific Pictures* case), Appeal No. 11-71844, Docket No. 16 at 3-9 (district court’s ruling on SLAPP motion). There is no better evidence of this clear overlap between the *Larson* and *Pacific Pictures* appeals than Larson’s and her co-defendants’ briefing on the *Pacific Pictures* writ, which devotes 10 pages to discussing the *Larson* case and her SLAPP motion.

Larson finally asserts that DC should have requested assignment to the Ninth Circuit panel that denied the *Pacific Pictures* defendants’ premature challenges to the district court’s SLAPP rulings—challenges they brought even before the

district court ruled on the motion. Such a request would not have been well-taken, as those proceedings were summarily dismissed without any merits briefing, any oral argument, or any substantive opinions being issued. Indeed, the writ petition was denied in a three-sentence order three weeks after it was filed. Appeal No. 10-73851, Docket No. 13. And the appeal was dismissed four days later for lack of jurisdiction in a curt minute order, and after the Clerk of Court issued an order to show cause why the case should not be dismissed for lack of jurisdiction. Appeal No. 10-56594, Docket No. 15.² Still two other Ninth Circuit panels have been forced to weigh in on this case in response to the *Pacific Pictures* defendants' latest writ petition, Appeal No. 11-71844, Docket Nos. 2, 8, but one and only one panel—the one that heard oral argument on that writ in February 2012—has ever had to spend considerable time addressing these Superman cases. It is to that panel that DC directed its motion for assignment, and that motion should be granted.

Dated: April 12, 2012

O'MELVENY & MYERS LLP

By: /s/ Daniel M. Petrocelli

Daniel M. Petrocelli

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² Larson's co-defendants filed yet another interlocutory appeal, which they voluntarily dismissed. *See* Appeal No. 10-56980, Docket Nos. 6, 13.