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

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DC's motion to lodge should be granted because Larson does not and cannot dispute that the original *Detective Comics #15* comic book that DC asks the Court to consider is self-authenticating and thus it is subject to judicial notice under this Court's established case law.[1] Avoiding this issue, Larson instead makes several arguments as to why the Court should not consider the Superman "Promotional Announcement" published in *Detective Comics #15*. None has merit.

1. Larson asserts that the "scope" of copyrightable elements in the Announcement is not before this Court on this Rule 54(b) appeal. Opp. at 1. While Larson waived any right to challenge the district court's Announcement rulings by failing to raise them in her opening brief, *see Gausvik v. Perez*, 392 F.3d 1006, 1008 n.1 (9th Cir. 2004), those rulings are surely before this Court, *assuming it rules that it has jurisdiction to hear Larson's First Claim in this case*. Larson's First Claim requests a declaration concerning the parties' "respective rights and obligations with respect to [copyright termination notices served by Larson] and the copyright interests thereby recaptured." ER-338-39 ¶¶ 53-55. Adjudication of that claim requires determining the extent to which Larson's recaptured rights (if any) are diminished by the Announcements, which feature the first appearance and

[1] *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (judicial notice warranted where "neither party disputes the authenticity" of evidence); *Valdivia v. Schwarzenegger*, 599 F.3d 984, 994 (9th Cir. 2010) (same); *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 960 (9th Cir. 2010) (taking judicial notice of magazine articles); *Fitzgerald v. Penthouse Intern., Ltd.*, 525 F. Supp. 585, 595 n.41 (D. Md. 1981) (same).

publication of Superman. DC Merits Br. at 40-41 (Docket No. 31-1); DC's Mot. to Dismiss Appeal at 11-17 (Docket No. 5-1). While DC contends this scope question must first fully be decided by the district court—and the failure to decide that question means Larson's appeal is premature—if the Court is going to hear Larson's appeal on her First Claim, then it can and should hear DC's cross-appeal on that claim, which challenges the district court's erroneous statements about what elements were visible in the Announcements. DC Merits Br. at 80-86.[2]

2. Larson next asserts the Court cannot take judicial notice of *Detective Comics #15* because it is not a "legal principle." Opp. at 3. She bases this argument on an overly-narrow reading of *U.S. v. Rivero*, 532 F.2d 450, 458 (5th Cir. 1976). *Rivero* articulated the general rule that an appellate court may take judicial notice of any matter "for the purpose of affirming or showing the impropriety of a decision below." 532 F.2d at 458. While *Rivero* involved taking judicial notice of a statute, the court placed no restrictions on the applicability of its holding, and the same rule has been relied on by appellate courts to take judicial notice of relevant and informative evidence.

To take two examples, in *McKay v. U.S.*, 516 F.3d 848, 849 n.2 (10th Cir. 2008), plaintiff brought suit to enforce his right to obtain special use permits to drill for oil and gas on land he had sold to the government. Although the deed

[2] Indeed, DC's cross-appeal on its First Counterclaim presents the same issue. *Id*. at 40.

transferring the land at issue was not in the record below, the circuit court took judicial notice of it "to inform [its] general understanding of the case." *Id.*

Two weeks ago, this Court applied the same principle to take judicial notice of documentary evidence in *Charles v. Felker*, 2012 WL 1065488, at *2 (9th Cir. Mar. 30, 2012); *see* Circuit Rule 36-3; FED. R. APP. P. 32.1. There, defendant claimed the trial court erred by not conducting a comparative juror analysis in denying his claim of discrimination in the prosecutor's use of peremptory challenges. On appeal, defendant sought to introduce the juror questionnaires used in voir dire to demonstrate that the prosecutor's stated reasons for his challenges were pretextual. *Charles*, 2012 WL 1065488, at *2. This Court took judicial notice of the questionnaires even though they were not in the record because they were "highly relevant." *Id.*

Under these cases—as well as several others Larson's opposition declined to address—this Court can and should take judicial notice of *Detective Comics #15*.[3]

3. Larson last argues the merits of DC's cross-appeal, asserting that the district court's ruling on the content of the Announcements issue was proper and it

[3] Larson's claim that *Rivero* was DC's "sole authority" for this Court's taking judicial notice of non-record evidence on appeal is false. Opp. at 3. DC cited several other cases to which Larson has no answer. *See supra* at 1 n.1; Mot. at 1 (citing, *e.g.*, *Daniels-Hall*, 629 F.3d at 998 (taking judicial notice of list of approved vendors on school district's website); *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 book about the construction of the Lincoln Center)).

considered all the evidence it needed to consider in issuing its *sua sponte* ruling. These merits arguments can and should be deferred to the merits stage of this appeal, but to address them briefly:

- DC did *not* submit an original Announcement in its summary judgment papers below because the *only* question before the district court was whether the Announcements fell outside the *statutory time limit* of Larson's copyright termination notices. DC Merits Br. at 80-81. As Larson herself asserted below, "The Question Of What Literary Elements Are Actually Contained In The Ad [Is] A Genuine Issue Of Material Fact" that could *not* be decided on summary judgment. SER-356-57. The district court thus erred in ruling *sua sponte* as to the copyrightable contents of the Announcements. *See Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir. 1982); DC Merits Br. at 80-86.[4]

[4] Larson's two cited cases (Opp. at 2) do not validate this erroneously premature ruling. *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1556 n. 3 (9th Cir. 1991), did not involve a *sua sponte* ruling—the court ruled on certain preliminary questions "[it] was required to answer" before addressing the issue on summary judgment, and the parties were "clearly advised" of the issues on summary judgment. Similarly, in *Portsmouth Square, Inc. v. Shareholders Protective Comm.*, 770 F.2d 866, 869-70 (9th Cir. 1985), the district court "made clear from the outset" that it would rule on an issue and "considered all the evidence" that the plaintiff "planned to present…." Here, the district court gave *no* notice it would rule on the scope question, and denied DC an opportunity to present an original Announcement or any of the other evidence, expert testimony, and argument DC had developed for trial. DC Merits Br. at 81-82.

- Larson also incorrectly asserts that the district court reviewed a legible version of the Promotional Announcements because DC filed a motion for reconsideration attaching an enlarged, high-resolution copy. Opp. at 2. The district court, in fact, *declined* to consider this blown-up version or any other version, stating "the salient point is not how those announcements may have looked if blown up, but rather as they appeared to readers in the comic book itself." SER-2. That is exactly the version of the comic book that DC presently seeks to lodge with this Court—the very comic book readers would have seen in 1938, and not the "low quality photocopies" that the district court complained about. SER-2.

Given that the district court made rulings concerning the elements visible in the Promotional Announcement, it would make little sense for this Court to review those rulings without the benefit of the actual Announcement—the authenticity of which is not disputed. DC's motion should be granted.

Dated: April 12, 2012

O'MELVENY & MYERS LLP

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

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