**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, Appellant, and Cross-Appellee.*

v.

WARNER BROS. ENTERTAINMENT INC., DC COMICS
*Defendants, Counterclaimants, Appellees, and Cross-Appellants*.

---

## APPELLANT LAURA SIEGEL LARSON'S MOTION TO STRIKE APPELLEES' SUPPLEMENTAL EXCERPTS OF RECORD AND PORTIONS OF PRINCIPAL AND RESPONSE BRIEF

---

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*

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Federal Cases

**Rules**

## INTRODUCTION

Plaintiff-Appellant Laura Siegel Larson ("Plaintiff") hereby moves to strike portions of Defendants-Appellees Warner Bros. Entertainment, Inc. and DC Comics' (collectively "Warner") Supplemental Excerpts of Record ("SER") and associated portions of Warner's Principal and Response Brief (Docket No. 31-1).

In gross violation of the rules governing appellate procedure, Warner's Supplemental Excerpts of Records (Docket No. 31) include ***19 documents (166 pages)*** that were not part of the District Court's record in this case, but were largely filed in a different case, *DC Comics v. Pacific Pictures Corp.*, Case No. 10-CV-03633 ODW (RZx) ("*DC Comics*"). Warner made no motion to expand the record; instead, it improperly asked the Court in mere footnotes in the Index to Warner's Supplemental Excerpts of Records to take judicial notice of this purported extra-record evidence. The *contents* of purported evidence, however, filed in a different case, are not subject to judicial notice. These documents and Warner's extra-record arguments based thereon should be swiftly struck. F.R.A.P. 10(a); Circuit Rule 10-2.

In *DC Comics*, Warner ginned up retaliatory claims against Plaintiff and her counsel, Marc Toberoff, after he had secured favorable legal decisions on Plaintiff's behalf in this case. Lacking meritorious legal arguments, Warner tries to improperly shoehorn documents from that case into the record to imbue this

appeal, involving genuine copyright issues of considerable interest and import, with the same smear campaign that dominates *DC Comics*, and which is completely irrelevant to the issues presented in this appeal.

As a result, Plaintiff is unfairly forced to address Warner's extraneous filings and prejudicial attacks, furthering Warner's obfuscation of the merits. Warner and its counsel should be sanctioned for such gamesmanship in blatant violation of well-known tenets of appellate procedure.[1]

## ARGUMENT

### A. The Record on Appeal is Limited to the Materials Filed With the District Court

It is fundamental to appellate practice that the record on appeal consists of: "(1) the official papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk." F.R.A.P. 10(a); *see* Circuit Rule 10-2 (the "complete record on appeal" consists of "the official transcript[s]" and the "district court clerk's records of original pleadings, exhibits and other papers filed with the district court").

Thus, the "record on appeal is generally limited to 'the original papers and exhibits filed in the district court.'" *Barcamerica Int'l USA Trust v. Tyfield*

[1] DC stated that it would "almost certainly" oppose this motion. Declaration of Pablo Arredondo, Ex. A. DC refused to provide a straight answer, and demanded a "meet and confer," even though the Circuit Rules nowhere require this. *Id.*

*Importers, Inc.*, 289 F.3d 589, 593-94 (9th Cir. 2002) (emphasis in original). Documents "not filed with the district court … are not part of the clerk's record and cannot be part of the record on appeal." *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988); *see also Sattari v. British Airways World Cargo*, 2012 U.S. App. LEXIS 4749 (9th Cir. Feb. 12, 2012) (same); *Anton v. Mendez,* 2011 U.S. App. LEXIS 20798 (9th Cir. Sept. 27, 2011) (same); *Lowry v. Barnhart*, 329 F.3d 1019, 1025-26 (9th Cir. 2003) (noting that "the 'excerpts of record' are just that: 'excerpts" of the "record,'" and that "[t]his limitation is fundamental"); *United States v. Armstead*, 421 Fed. Appx. 749, 751 (9th Cir. 2011) (holding that the "contention that the evidence is properly included in the appellate record because it consists of documents filed in *other* district court cases is without merit") (emphasis in original).

This rule applies even where a party asserts "newly discovered" evidence. *In re Weisband*, BAP AZ-10-1239, 2011 WL 3303453 (B.A.P. 9th Cir. June 13, 2011) (striking "newly discovered evidence" that was not presented to lower court); *Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1511 n. 5 (9th Cir.1994) (declining to consider "new evidence" and noting "[f]acts not presented to the [trial] court are not part of the record on appeal").

To rationalize its improper conduct Warner has previously cited to cases that provide no support for its wholesale supplementation of the record. *See Mangini v.*

*United States*, 314 F.3d 1158, 1160-1161 (9th Cir. 2003) (taking notice of evidence that the judge was unequivocally subject to mandatory disqualification); *Colbert v. Potter*, 471 F.3d 158, 165-66 (D.C. Cir. 2006) (permitting complete copy of a single document to be filed where partial copy filed with the district court); *Rigsby v. Avenenti*, 1992 U.S. App. LEXIS 15480 (9th Cir. June 26, 1992) (habeas petition in criminal case); *Cootz v. General Tel. Co.*, 1988 WL 131672, at *5 n.5 (9th Cir. Nov. 25, 1988) (unpublished summary opinion; taking judicial notice of a collective bargaining agreement in an employment dispute).

*Lowry v. Barnhart*, 329 F.3d 1019, expressly limited the situations when courts should accept extra-record material and advised against the sort of appellate free-for-all DC seeks:

> ***Save in unusual circumstances, we consider only the district court record on appeal.*** Federal Rule of Appellate Procedure 10(a) explains which materials constitute the record. Fed. R. App. P. 10(a). And Circuit Rule 30-1 provides that the appellant (and, if necessary, the appellee) shall prepare "excerpts" of that record. See 9th Cir. R. 30-1.1(a). The rather obvious implication is that the "excerpts of record" are just that: "excerpts" of the "record."
>
> ***This limitation is fundamental***. As a court of appeals, we lack the means to authenticate documents submitted to us, so ***we must be able to assume that documents designated part of the record actually are part of the record***. To be sure, the fact that a document is filed in the district court doesn't resolve all questions of authenticity, but it does ensure that both opposing counsel and the district court are aware of it at a time when disputes over authenticity can be properly resolved. ***Litigants who disregard this process impair our ability to perform our appellate function.***
>
> There are exceptions to the general rule. We may correct inadvertent omissions from the record, take judicial notice, and exercise inherent authority to supplement the record in extraordinary cases. ***Consideration of***

> ***new facts may even be mandatory, for example, when developments render a controversy moot and thus divest us of jurisdiction***. One constant runs through all these exceptions, however: Only the court may supplement the record. "[It is a] basic tenet of appellate jurisprudence . . . that parties may not unilaterally supplement the record on appeal with evidence not reviewed by the court below." Litigants should proceed by motion or formal request so that the court and opposing counsel are properly apprised of the status of the documents in question.
>
> Sadly, this is not the first time a party has graced us with so-called "excerpts of record" that have never before seen the light of courtroom day.

329 F.3d at 1024-25 (Kozinski, C.J.) (emphases added) (sanctioning party for inclusion of one extra-record document in excerpts of record).

Warner's attempt to substantially expand the record by requests in mere footnotes is also improper. Fed. R. App. P. 10(e)(2)(C) allows the court of appeals to supplement the record "***only by formal motion*** based on extraordinary circumstances or error correction." *United States v. Boulware*, 558 F.3d 971, 976 (9th Cir. 2009) (emphasis added) (citing *Lowry*).

The appropriate remedy is to strike all of Warner's improperly-filed documents and the portions of the briefing that directly or indirectly rely upon them.[2] *See Lowry*, 329 F.3d at 1025-26; *Barcamerica*, 289 F.3d at 595 (striking excerpt documents and portion of appellate brief relying on them); *Tonry v. Security Experts, Inc.*, 20 F.3d 967, 973-74 (9th Cir. 1994) (refusing to consider improper documents not filed with district court and references thereto in briefing)

[2] A copy of Warner's brief identifying portions that rely on extra-record evidence is attached as Exhibit B to the accompanying Declaration of Pablo Arredondo.

(*abrogated on other grounds, King v. AC & R Advertising,* 65 F.3d 764 (9th Cir. 1995).

### B. Judicial Notice Is Not a Means For An Appeals Court To Consider the Contents of Purported Evidence Not Presented to the District Court

In a footnote to the Table of Contents of its Supplemental Excerpts of Record, Warner casually couches its improper expansion of the record as a request to take judicial notice of documents filed in the *DC Comics* case. However, judicial notice is only appropriate for matters "'generally known within the territorial jurisdiction of the [] court' or 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" *Jespersen v. Harrah's Operating Co., Inc.,* 444 F.3d 1104, 1110 (9th Cir. 2006).

Judicial notice is not a device to bootstrap into the appellate record dozens of documents never submitted to, or considered by, the trial court. *See Irvin v. Baca*, 205 Fed. Appx. 577, 578 (9th Cir. 2006) ("Pages … of appellant's supplement excerpts of record were not part of the district court record, and there is no basis for us to take judicial notice of them."); *Peroulis v. Kozak*, 362 Fed. Appx. 727, 729 (9th Cir. 2010) (request for judicial notice denied because "documents not filed with the district court or admitted into evidence by that court"); *Thol v.*

*Waddington*, 344 Fed. Appx. 452, 453 (9th Cir. 2009) (judicial notice denied "to the extent such documents were not part of the record"); *Safron Capital Corp. v. Leadis Tech., Inc.*, 274 Fed. Appx. 540, 541 (9th Cir. 2008) (denying request for judicial notice as to "extra-record materials").

As Warner and its counsel well know, this contested evidence from another case is not the proper subject of judicial notice. *See Henderson v. State of Oregon*, 203 Fed. Appx. 45, 52 (9th Cir. 2006) ("Adjudicative facts appropriate for judicial notice are typically different from facts found in affidavits supporting litigation positions which often present facts subject to dispute. ")

In the cases cited by Warner, a court took judicial notice of filings in another proceeding not for the truth of their contents, but as to the fact of their occurrence. *See In Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006) (taking judicial notice of pleadings solely to "determine what issues were actually litigated"); *Headwaters Inc. v. United States Forest Serv.*, 399 F.3d 1047, 1051 (9th Cir. 2005) (taking judicial notice of a docket to establish a procedural event); *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (taking judicial notice of a lower court's final judgment); *United States v. Wilson*, 631 F.2d 118, 119-120 (9th Cir. 1980) (judicial notice was *not* proper given that the facts asserted by movant were in dispute). None of these cases support Warner's attempt to expand the record on

appeal by citing to such extraneous and inadmissible materials for their supposed truth. *See, e.g.,* Docket No. 31-1 at 37 ("The letter confirms that Marks told Toberoff that Larson had a 'deal' with DC.").

Warner contends that judicial notice is "particularly appropriate" to documents filed in the *DC Comics* case because these documents were filed after the orders at issue in this appeal and were supposedly "unavailable." SER Vol. 1 at p. xi. The logic of Warner's position would mean that new contested evidence could always be introduced on appeal simply because such documents had been filed in a later case.

The cases Warner relies upon for this point are either inapposite or contrary to its ludicrous position. *See* SER Vol. 1 p. 9; *Werner v. Werner,* 267 F.3d 288, 295 (3rd Cir. 2001) (declining to take "judicial notice of the truth of the contents of a filing from a related action"); *Sandpiper Vill. Condo Ass'n v. Louisiana-Pacific Corp.*, 428 F.3d 831, 837 (9th Cir. 2005) (taking judicial notice of previously-unavailable portions of the district court's trial transcript in the same case); *Hammock v. Bowen*, 867 F.2d 1209, 1214 (9th Cir. 1989) (taking judicial notice of evidence submitted to the district court after a hearing, but prior to the appeal).

Secondly, Warner's contention that such documents were "unavailable" is erroneous as the documents were either in its possession during the case below or could have been obtained via discovery. *See* SER 714-805, 845-868 (in Warner's

possession); SER 809-816, 838-844, 874-876 (produced in *DC Comics* pursuant to discovery). For instance, Warner requests judicial notice of documents, such as Detective Comics' magazines and covers from 1938 and excerpts from Jerome Siegel's decades-old memoir that were in its possession and could have readily been presented to the district court. SER 714-796, 802-04. *See Milne v. Stephen Slesinger, Inc.*, 156 Fed. Appx. 960, 961 (9th Cir. 2005) (holding that judicial notice is improper as to evidence that "could have been submitted to the district court," but was not).

### C. This Court Should Strike Warner's Offending Portions of the Record and the Improper Argument Based Thereron

All of Warner's improper inclusions in its Supplemental Excerpts of Record (*i.e.*, SER 714-880) that were not before the district court herein should be struck. In addition, those portions of Warner's appellate brief, set forth in Exhibit B, which purport to rely on such improper evidence, should also be struck. *See Barcamerica Int'l USA Trust.*, 289 F.3d at 595 (9th Cir. 2002) (striking documents not before district court and those portions of opening brief which relied on them); *Ctr. for Biological Diversity v. United States Fish & Wildlife Serv.,* 450 F.3d 930, 944 (9th Cir. 2006) (same); *Aluisi v. Unum Life Ins. Co. of Am.*, 407 Fed. Appx. 126, 129 (9th Cir. 2010) (same); *United States v. Maddox*, 614 F.3d 1046, 1047 (9th Cir. 2010) (striking portion of brief referring to evidence that was not a part of

the district court record); *Webb v. Douglas County*, 224 Fed. Appx. 647, 648 (9th Cir. 2007) (same).

### D. Warner Attempts To Prejudice The Court With Irrelevancies

Throughout its brief, Warner gratuitously purports to detail extra-record subjects, and misrepresents extra-record documents, in digressions that are wholly irrelevant to the legal issues before this Court.

For instance, citing to extra-record material, Warner falsely claims that an August 2002 offer by Ari Emanuel to the Siegels, and the Siegels' later retention of Mr. Toberoff, "interfered" with its negotiations. Opp. 7, 18-19, 37, 39. Warner's trumped-up allegations are flatly contradicted by Joanne Siegel's May 9, 2002 letter complaining about Warner's "unconscionable contract dated February 4, 2002," and that "after negotiations dragged on for four difficult years….we were stabbed in the back with [this] shocking contract." SER 412-414. Warner's ridiculous allegations are immaterial in any event to the issue before the Court: Whether Warner and the Siegels formed a binding contract nearly a year earlier, in October 2001.

Warner mischaracterizes other extra-record material to prop up its retaliatory attacks against its long-time opposing counsel on matters that have no conceivable relevance to any of the ***legal*** issues presented in this appeal, including: Mr. Toberoff's purported business interests (Opp. 18); Mr. Toberoff's purported

relationship with the heirs of Joseph Shuster (Opp. at 18, 19 n.3); and both Gang Tyre's (Opp. 17) and Mr. Toberoff's (Opp. 19) contingent legal fees. Warner's attempts to derail the merits and elicit prejudice against Plaintiff by attacking her attorney are as transparent as they are improper.

Warner's erroneous factual allegations and legal arguments, not relevant to this case, are addressed more fully in the appellants' opening brief in *DC Comics*, 9th Cir. Case No. 11-71844, Docket No. 8, regarding their Anti-SLAPP motion.

### E. Warner Should Be Sanctioned

Warner's violation of Rule 10(a)(1) is particularly egregious. In assessing the severity of a Rule 10(a)(1) violation for the purpose of deciding whether to impose sanctions, *Lowry* considered the following factors: (1) whether counsel contended that the documents were part of the record; (2) the magnitude of the improper expansion; and (3) whether the issue was "one of first impression." *Lowry,* 329 F.3d at 1026 n 7. All three of these factors point toward imposing sanctions for Warner's knowing violation of the rules. Warner does not contend that any of the documents it improperly put before the Court are part of the district court record. The magnitude of this abuse, 166 pages spanning 19 documents, is much larger than in minor instances where this Court has declined sanctions. *See Dela Rosa v. Scottsdale Mem'l Health Sys. Inc., 136 F.3d 1241, 1242-43* (9th Cir. 1998) (only one page in five-volume exceprts of record improperly included).

Finally, the impropriety of Warner's gamesmanship is not issues of first impression, as Warner's experienced counsel surely knows.

As a direct result of Warner's improper tactics, Plaintiff has been forced to incur considerable attorney's fees and costs in both addressing Warner's improper extra-records documents and in bringing this motion. Warner has no plausible justification for its willful filing of these blatantly improper extra-record documents, and should be sanctioned for its conduct. "If the only penalty for including forbidden material in the excerpts of record is removal of that material, it's hard to see why anyone would think twice before violating the rule." *Lowry*, 329 F.3d at 1025-1026 (sanctioning appellee and permitting appellant to recover reasonable attorney's fees for appellee's attachment of an extra-record letter in violation of Rule 10(e)(2)(C)). Full reimbursement for the Plaintiff's attorney's fees and costs of bringing this motion to strike and addressing Warner's improper extra-record materials and arguments would be a reasonable sanction.

## CONCLUSION

For all the above reasons, this Court should issue an Order striking the improper portions of Warner's SER and the related portions of Warner's Principal and Response Brief set forth in Exhibit A, and sanctioning Warner in the amount of reasonable attorney's fees in bringing this motion to strike and addressing Warner's improper extra-record materials/arguments.

Dated: May 24, 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 Plaintiff-Appellant Laura Siegel Larson's brief is proportionately spaced, has a typeface of 14 points or more, and does not exceed 20 pages.

Dated: May 24, 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: May 24, 2012 TOBEROFF & ASSOCIATES, P.C.

/s/ Marc Toberoff
Marc Toberoff

Attorneys for Appellant, Laura Siegel Larson