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)

OPPOSITION TO MOTION TO STRIKE AND, IN THE ALTERNATIVE, MOTION FOR JUDICIAL NOTICE

JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
Telephone: (202) 383-5300

DANIEL M. PETROCELLI
MATTHEW T. KLINE
CASSANDRA L. SETO
O'MELVENY & MYERS LLP
1999 Avenue of the Stars, 7th Floor
Los Angeles, California 90067
Telephone: (310) 553-6700
Facsimile: (310) 246-6779

Attorneys for Warner Bros. Entertainment Inc. and DC Comics

INTRODUCTION

The Index to the Supplemental Excerpts of Record submitted by DC clearly identifies any material not submitted to the district court, and requests that this Court take judicial notice of these documents. *See* Docket No. 32 ("SER") at vi-xiii nn.3-10. Each request for judicial notice explains the legal basis for judicial notice of the specific document in question, and cites the relevant case law supporting that request. *Id*. Larson moves to strike the SER and any portion of DC's brief that relies on documents subject to judicial notice. But Larson does not question the authenticity of any of these documents, nor does she identify any instance in which consideration of these documents would unfairly prejudice her position. Instead, she complains about the quantity of documents and the form of DC's request, arguing that requests for judicial notice must be made in a motion.

DC believes its detailed, supported, and explicit request for judicial notice in the SER constitutes a formal request for judicial notice, and thus opposes this motion. If this Court concludes that a separate motion must be filed, however, then in the alternative DC moves the Court to take notice of the contested documents.

Fully half of this "evidence" consists of comic books, specifically, two self-authenticating 1930s Superman comic books and a comic book cover. The other primary portion (76 pages, and 15 documents) is made up of court orders and filings from *DC Comics v. Pacific Pictures Corp.*—a case that Larson herself

admits is a "related" matter currently pending before this Court, as well as the district court below. Docket No. 12 at 58-59 (Larson's statement of related cases). Appeal Nos. 11-71844; No. 11-56934; C.D. Cal. No. CV-10-3633. These 15 self-authenticating documents and court filings are the most common example of evidence appropriate for judicial notice, as shown below.

The remaining seven pages of extra-record material consist of excerpts from Jerry Siegel's memoir (Larson's father, and the man whose alleged rights and creations are at issue in this case), and from the deposition testimony of Kevin Marks, Larson's prior counsel (and a key witness on DC's settlement defense). Portions of both of these documents were included in the record below, and are relied on extensively by Larson.

All of these documents are necessary for completeness, and Larson cannot and does not dispute the authenticity of any of this material. This is not a case tried to final judgment, but rather one where Larson took a Rule 54(b) appeal while the briefing and resolution of related issues remains pending before the district court. The contested evidence DC submitted is self-authenticating, not subject to reasonable dispute, and in many cases demonstrates inconsistent factual positions that Larson herself has taken in related litigation. Consideration of this material will aid this Court in reaching a complete and accurate determination of these issues.

Accordingly, Larson's motion should be denied, and DC's request for judicial notice should be granted. To be clear, however, the Court need not consider any of the evidence discussed herein to rule for DC on all of the questions presented in this appeal.

ARGUMENT

I. THIS COURT MAY TAKE JUDICIAL NOTICE WITHOUT A FORMAL MOTION

This Court may take judicial notice of documents or information outside the record on appeal, and may do so without a "formal motion." *Singh v. Ashcroft*, 393 F.3d 903, 905-06 (9th Cir. 2004); *see* C. GOELZ & M. WATTS, CALIFORNIA PRACTICE GUIDE: FEDERAL NINTH CIRCUIT CIVIL APPELLATE PRACTICE § 4:220 (Rutter 2012) ("NINTH CIRCUIT PRACTICE GUIDE"). All that is required is a "formal request" sufficient to "apprise[]" the court and opposing party "of the status of the documents." *Lowry v. Barnhart*, 329 F.3d 1019, 1025 (9th Cir. 2003).

DC's particularized requests comply with this standard. Each request identities the document in question, explains the basis for judicial notice, and cites legal support for consideration of that specific document. *See* SER Vol. I at vi-xiii nn.4-10. DC's index clearly marks and distinguishes the extra-record material docketed in the related *Pacific Pictures* case from the materials in this case by listing the *Pacific Pictures* documents in a separate table titled by case name and number. *Id.* at xi. In no way, did DC hide the ball. Despite Larson's hyperbolic

accusations, Mot. 5, she never identifies a single statement that could remotely be characterized as deceptive or improper.

Larson complains about the "dozens of documents" and "166 pages" DC submitted, implying that the number of pages alone should trump application of the doctrine of judicial notice. Mot. 1, 6. But courts may take judicial notice whenever facts "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b)(2); *see* 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 201.02[2] (Matthew Bender 2012) (judicial notice "dispens[es] with formal proof when a matter is not really disputable"). The doctrine is particularly appropriate where evidence is self-authenticating or where its authenticity is not contested. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).

As DC explained in its individual requests, SER Vol. I at vi-xiii nn.4-10, each document submitted is properly judicially noticed for the following reasons:

Comic books. Fully 83 pages—*half* of the non-record evidence Larson complains about—are simply reproductions of comic books (*Action Comics #1* and *Detective Comics #15*), and the cover image from *Action Comics #1*. SER-714-796. These works are self-authenticating under Federal Rule of Evidence 902(6), and as such, are proper subjects for judicial notice. *See Trigueros v. Adams*, 658 F.3d 983, 987 (9th Cir. 2011) ("We retain discretion to take judicial notice of

documents 'not subject to reasonable dispute.'"); *Daniels-Hall*, 629 F.3d at 998; *Valdivia v. Schwarzenegger*, 599 F.3d 984, 994 (9th Cir. 2010); *Hotel Emps. & Rest. Emps. Union, Local 100 v. City of New York Dep't of Parks & Recreation*, 311 F.3d 534, 540 n.1 (2d Cir. 2002). Nor does Siegel dispute for a moment that the documents are authentic or explain how she would be prejudiced if the Court considered them. These comics are the subject of the copyright dispute before this Court, and are relevant to determining the copyrightable elements in the Promotional Announcements published prior to *Action Comics #1*, including whether the "S" on Superman's chest is visible, and to establish the non-trivial distinctions between the cover of *Action Comics #1* and the similar panel inside the comic book. *See* Docket No. 31-1 at 61-68, 80-86.

Siegel memoir. Two pages are an excerpt from Jerry Siegel's memoir, portions of which are in the district court record. SER-804-805. Larson relied on the manuscript extensively in her First Brief on Cross-Appeal, Docket No. 12 at 7-8, 37, 55, and she does not and cannot dispute its authenticity or that Jerry Siegel made the admissions DC cites. Consideration of the remaining portions of the memoir is appropriate for completeness. *Trigueros*, 658 F.3d at 987; *Daniels-Hall*, 629 F.3d at 992; *Valdivia*, 599 F.3d at 994; *see also Colbert v. Potter*, 471 F.3d 158, 165-66 (D.C. Cir. 2006) (a receipt was relevant to whether the statute of limitations had run, but only a photocopy of the back side of the receipt had been

submitted to the district court; the D.C. Circuit allowed appellee to supplement the record with a complete copy because, as here, this evidence "go[es] to the heart of the contested issue, [and] it would be inconsistent with this court's own equitable obligations … to pretend that [it does] not exist"). Here, this indisputably authentic memoir contains admissions from Larson's predecessor-in-interest that flatly refute a position she now endorses. Specifically, these pages contain a clear admission by Jerry Siegel that pages 3-6 of *Superman #1* were not made for hire, but rather were created at DC's direction after 1938. Docket No. 31-1 at 77-78.

District court filings from a closely related case. Thirty-three pages are documents filed or orders issued in the related *Pacific Pictures* case, which concerns the same parties and judge. SER-806-828, 869-874, 877-80; FED. R. EVID. 902(4). Settled precedent allows this Court to take judicial notice of filings in this Court, or in any other court. *See*, *Trigueros*, 658 F.3d at 987; *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006); *Headwaters Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1051 (9th Cir. 2005); *U.S. v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980); NINTH CIRCUIT PRACTICE GUIDE at § 4:225 ("Appellate courts may take judicial notice of matters of record in other court proceedings, including those occurring during the pendency of the federal appeal.").

Judicial notice of these district court filings is particularly appropriate because the disputed documents were authored or produced by Larson and her co-

defendants in *Pacific Pictures* (or were court orders relating to those documents), and bear directly on two determinative issues—DC's settlement defense, and the statute of limitations counter-claim. The parties in this case are parties in *Pacific Pictures*, and each case and arises out of the same set of facts; thus, it is no surprise that documents revealed in the on-going discovery in *Pacific Pictures* lend direct support to DC's defenses here. The district court filings are central to the issues in this cross-appeal and will provide this Court with a more comprehensive understanding of the issues presented, in the following respects:

- July 11, 2003, Letter from Larson to Michael Siegel (SER-810-814): This letter, authored by Larson, indicates that Larson knew she was bound by the terms of the October 29, 2001, settlement with DC. In it, she repeatedly states that Kevin Marks insisted, in August 2002, that Larson had a "deal with Time Warner/DC." This evidence shows that there is, a*t the very least*, a jury question as to whether Larson understood she was bound to the October 19 terms. Docket No. 31-1 at 37.
- Excerpt of Privilege Log of Bulson Archive (SER-816): This privilege log, which was prepared by defendants in *Pacific Pictures*, identifies a November 17, 2001, email from Toberoff to Michael, SER-816 (Entry 339), which establishes that Toberoff was in contact with the Siegels well before August 2002—directly refuting claims made by Toberoff in his

motion to strike in *Pacific Pictures*. This evidence is relevant to showing Toberoff's interference with DC's business relationship with Larson by wrongfully inducing her to repudiate the 2001 settlement and cut ties with DC. Docket No. 31-1 at 39.

- October 25, 2011, Order Denying Defendants' SLAPP Motion (SER-817-823): The district court's order in *Pacific Pictures* denying defendants' motion to strike explains Toberoff's inducement of Larson to repudiate the 2001 settlement. Docket No. 31-1 at 39.
- October 24, 2011, Order Granting DC's Motion for Review (SER-824-825): The district court's order in *Pacific Pictures* granting DC's motion for review shows that DC recently obtained Larson's July 2003 letter to Michael, which directly refutes claims made by Larson here. Docket No. 31-1 at 37.
- Excerpt of September 2, 2011, Joint Stipulation Regarding DC's Motion to Compel (SER-826-28) & Excerpt of August 13, 2010, Defendants' SLAPP Motion (SER-877-80): In the district court below, Larson contended that negotiations with DC were not terminated until September 21, 2002. The court agreed, holding her claims to be timely. SER-60-61. This document shows that Larson argued the opposite in *Shuster* (in order to protect the interests of Marc Toberoff), claiming that settlement

discussions with DC were "moribund" as of May 9, 2002. SER-825; *see also* SER-878-879. This evidence is directly relevant to determining whether Larson's claims were timely brought; the district court below relied on Larson's representations, and she cannot take contradictory factual positions in an attempt to protect Toberoff's interests. Docket No. 31-1 at 39. These statements are judicially noticeable as direct admissions. *Bucci v. Essex Ins. Co.*, 393 F.3d 285, 296 n.5 (1st Cir. 2005); *In re Indian Palms Assocs., Ltd.*, 61 F.3d 197, 205 (3d Cir. 1995). Indeed, Larson's own brief asks this Court to consider the facts from an unrelated case decided over 60 years ago as substantive evidence relevant to DC's work-for-hire claims, Docket No. 43-1 at 64-65; *National Comics Pubs., Inc. v. Fawcett Pubs., Inc.*, 191 F.2d 594 (2d Cir. 1951), even though the relevant documents from *National* were never filed below and are not part of the record here.

Marks Deposition. Another category of documents is a five-page excerpt from the official deposition transcript of Kevin Marks, substantial portions of which are already in the record here. SER-797-801. The entirety of the transcript was filed in the related *Pacific Pictures* case, Docket No. 305-14, and again, the accuracy and authenticity of the transcript is not subject to dispute, as counsel for both parties participated in the deposition and both cited other parts of the

transcript extensively below. This testimony shows that Marks' fee for representing Larson was only 5%, meaning almost all of the money from the 2001 settlement would be Larson's alone. Docket No. 31-1 at 17.

Ninth Circuit filings from a closely related case. The remaining 42 pages are made up of documents filed in *both* the district court *Pacific Pictures* proceeding, No. CV-10-3633, and with this Court in a related writ proceeding initiated by defendants, Appeal No. 11-71844, Docket No. 3-5. SER-829-68, 875-76. They are thus subject to judicial notice as court filings for all the reasons discussed above. These documents establish that Toberoff stands to receive 40% of any recovery by Larson, SER-839-44; Toberoff has a similar 50% contingency fee with the Shusters, meaning Toberoff will receive the largest percentage of any recovery of the heirs, SER-860-63; and Toberoff communicated to Marks in August 2002 an offer on behalf of an unnamed "investor" willing to purchase the Siegels' rights for $15 million cash and generous "back-end" compensation, SER-875-76. Docket No. 31-1 at 18-19. Moreover, 14 pages of these Ninth Circuit filings consist of the Shusters' termination notice filed with the Copyright Office, which is additionally subject to judicial notice as a public record. SER-45-58; *e.g.*, *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) ("a court may take judicial notice of 'matters of public record'"); *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1356 n.14 (Fed. Cir. 2010) (registration documents by Patent and

Trademark Office are judicially noticeable). The Shuster termination is relevant to Toberoff's pursuit of Siegel's and Shuster's heirs, and his inducement of both sets of heirs to repudiate their existing contractual arrangements with DC—specifically, the 2001 settlement between the Siegels and DC. Docket No. 31-1 at 18.

II. LARSON'S OBJECTIONS TO JUDICIAL NOTICE LACK MERIT

Larson does not specifically challenge the request for judicial notice as to individual pieces of evidence. She instead asserts in general terms that judicial notice is inappropriate here, but her objections are meritless.

Larson first argues that judicial notice does not apply to "new evidence." Mot. 8. But an appellate court "may take judicial notice of filings or developments in related proceedings which take place after the judgment appealed from." *Werner v. Werner*, 267 F.3d 288, 295 (3d Cir. 2001); *see Overstreet ex rel. NLRB v. United Bd. of Carpenters & Joiners of Am., Local 1506*, 409 F.3d 1199, 1204 n.7 (9th Cir. 2005); *Hammock v. Bowen*, 867 F.2d 1209, 1214 (9th Cir. 1989); . This rule extends to materials produced by a party, *Hammock*, 867 F.2d at 1214, as well as court orders issued in a related case, *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1186 (9th Cir. 2011); *Overstreet*, 409 F.3d at 1204 n.7.

Second, Larson contends that the materials were "available" and could have been filed by DC in the district court. None of the court filings from *Pacific Pictures* was available before the court below issued the relevant rulings, however,

and the remaining *Pacific Pictures* documents were unavailable because Larson and the other defendants had improperly withheld them. SER-810-14, 874-76. The comic books were available, but there were several issues connected to the scope of the copyright yet to be resolved by the district court. Docket No. 31-1 at 40-41. And in any event the fact that these comic books have been accessible to the public for over 70 years re-affirms their authenticity and discredits any claim of unfair surprise by Larson.

Finally, Larson contends that even if judicial notice applied, it would extend only to the *existence* of certain documents, not to the *truth* of their contents. Mot. 7-8. But *half* of the extra-record documents DC submitted were comic books not submitted for any "truth" contained therein. Many of the other documents are Larson's own admissions subject to judicial notice, and others are submitted to invoke judicial estoppel to prevent Larson from taking inconsistent positions before the courts. Many of the remaining documents DC invokes only for the procedural facts about what happened in the *Pacific Pictures* case. Docket No. 31-1 at 37, 39. In sum, none of Larson's generalized objections addresses the specific bases laid out in DC's requests for judicial notice, and none prevents this Court from exercising its discretion to take judicial notice of these relevant and useful documents.

V. LARSON'S REQUESTED RELIEF IS OVERLY BROAD

Larson requests sanctions, apparently on the theory that identifying each document and providing legal analysis as to the basis for judicial notice is not enough to constitute a "formal request or motion" for judicial notice under *Lowry*, 329 F.3d at 1025. But this case is nothing like *Lowry*, where a party slipped a new document the party had just created into the appellate record without identifying it as new. *Id*. Here, by contrast, the documents are either self-authenticating or come from Larson herself, and DC carefully noted each one in its index to the SER.

Larson also requests that the Court strike all statements in DC's Principal Brief citing to any extra-record evidence, and attaches as Exhibit B to her motion a copy of DC's brief with her proposed redactions. Mot. Ex. B at 4-128. Even putting aside the fact that all the contested documents are properly subject to judicial notice, most of the redactions Larson proposes were of statements *independently supported by other evidence not subject to dispute*. Even if Larson could show that DC's extra-record evidence is not subject to judicial notice—which she cannot—she provides no support for striking statements that are otherwise supported by evidence in the record.

For example, Larson asks the Court to strike DC's statement that: "Siegel and Shuster's additions were also created at DC's expense—Siegel and Shuster

were paid for their *Action Comics #1* contributions, and DC assumed the financial risk and burden of publishing, distributing, and marketing *Action Comics #1*." Mot. at Ex. B-85. Besides the disputed excerpt from Siegel's memoir, DC cites a letter enclosing a check to Siegel as payment for *Action Comics #1*, SER-383; findings of fact from the Westchester court that DC paid Siegel and Shuster for that comic book and spent significant sums to promote and popularize it, ER-958-60; and a 1938 letter from a DC editor to Siegel reminding him of the "tremendous gamble" DC had taken in choosing to publish Superman, ER-425-27, among other evidence. This evidence—which Larson does not challenge—is more than adequate to support the statement even without any citation to Siegel's memoir.

Similarly, Larson asks this Court to strike the factual statement that "[a] little more than six months later, however, Larson repudiated the agreement, fired Marks, and began working with Marc Toberoff (a Hollywood producer/lawyer) and Ari Emanuel (an agent) to sell her putative Superman rights." Mot. at Ex. B-24. Aside from the *Pacific Pictures* documents DC cited for that statement, the brief also cites testimony from Kevin Marks, the Siegels' prior counsel; testimony from Toberoff; a September 21, 2002, letter sent to Marks and DC terminating Gang Tyre's representation of the Siegels and ending all negotiations with DC; and the October 3, 2002, business agreement between the Siegels, Ari Emanuel, and Toberoff . Docket No. 31-1 at 7 (citing SER-133-34, 182-83, 404, 417-20, 422-25,

819-20, 835-37). This evidence is likewise independently sufficient to support the proposition even without any reference to the disputed document.

DC's attached Appendix details each instance in which Larson's proposed relief would strike a statement supported by record and extra-record evidence, and reproduces the cited portion of the record evidence to demonstrate the over-breadth of Larson's objections. There is no basis for these redactions.

CONCLUSION

For the foregoing reasons, Larson's motion to strike should be denied, and DC's request to take judicial notice of non-record evidence should be granted.

Dated: June 5, 2012

O'MELVENY & MYERS LLP

By: /s/ Daniel M. Petrocelli
Daniel M. Petrocelli
Attorneys for Warner Bros. Entertainment Inc. and DC Comics

APPENDIX

Statements in Opening Brief Supported by Uncontested Record Evidence in Addition to the Contested Citations

Statement in Brief	Uncontested Record Evidence Cited
A little more than six months later, however, Larson repudiated the agreement, fired Marks, and began working with Marc Toberoff (a Hollywood producer/lawyer) and Ari Emanuel (an agent) to sell her putative Superman rights. Br. at 7.	**Deposition testimony of Kevin Marks (SER-133-34):** Q. Am I correct that on September 21 you received a letter from Joanne and Laura stating that they were terminating the law firm and instructing you not to take any further action? A. I don't recall what date the letter received, but it was received sometime after the letter was dated. . . . This letter was the first time I had heard our services had been terminated . . . . **Toberoff Timeline (SER-83):** The Siegels are angry at Kevin Marks that he said he would testify against them if they took MT's offer, and relations break down between the Siegels and Gang, Tyrer. They fire Gang, Tyrer. And, because the Siegels believed that MT was sympathetic to their plight, and because MT appealed to their sense of ownership of SUPERMAN, they decide to enter into an agreement with Intellectual Properties' Worldwide, otherwise known as "IPW," Marc Toberoff's film production company, for 10% for any kind of deal he got to make a movie or exploit the rights. **Deposition testimony of Marc Toberoff (SER-404):** Q. Prior to the November 29, 2001

Statement in Brief	Uncontested Record Evidence Cited
	initial call to Mr. Marks, had you and Mr. Emanuel discussed the Siegel interest in Superman? … A. Yeah. Actually, I IP Worldwide I was general counsel to IP Worldwide. . . . Q. Once again, you were a joint venture with Mr. Emanuel, were you not? A. That's correct, but I was also part of the company. . . . **September 21, 2002, letter from Larson and Joanne Siegel to Kevin Marks (SER-418):** As we previously discussed with you and hereby affirm, we rejected DC Comics' offer for the Siegel Family interest in Superman and other characters . . . . We similarly reject your redraft . . . . Therefore due to irreconcilable differences, after four years of painful and unsatisfying negotiations, this letter serves as formal notification that we are totally stopping and ending all negotiations with DC Comics, Inc., its parent company AOL Time Warner and all of its representatives and associates, effective immediately. **September 21, 2002, letter from Larson and Siegel to Paul Levitz (SER-420):** [E]ffective immediately, we are totally stopping and ending negotiations with DC Comics, Inc. . . . concerning the Jerry Siegel Family's rights to Superman, Superboy, the Spectre, and all related characters and entities.

Statement in Brief	Uncontested Record Evidence Cited
	Agreement between Larson and Siegel and Toberoff and Ari Emanuel, on behalf of IP Worldwide, dated October 3, 2002 (SER-422): This letter shall confirm the agreement and understanding between you ("Owner") and us ("IPW") regarding Owner's retention of IPW to exclusively represent Owner with respect to any and all of Owner's rights, claims, title and interest in and to the comic book property common known as "Superman," including, without limitation, all characters and copyright interests therein . . .
DC's artists also created a cover for Action Comics #1 based on a panel that featured Superman in his DC-colorized costume—red cape and boots, blue leotard, and heraldic red "S" crest—and exhibiting super-strength by lifting a car. Br. at 12.	**Order on Motion for Partial Summary Judgment (SER-14):** On or around February 16, 1938, the pair resubmitted the re-formatted Superman material to Detective Comics. Soon thereafter Detective Comics informed Siegel that, as he had earlier suggested to them, one of the panels from their Superman comic would be used as the template (albeit slightly altered from the original) for the cover of the inaugural issues of Action Comics. **March 1, 1938, letter from Vin Sullivan to Jerry Siegel (SER-388):** I'm enclosing a silverprint of the cover of Action Comics. You'll note that we already used one of those panel drawings of SUPERMAN, as you suggested in your recent letter.

Statement in Brief	Uncontested Record Evidence Cited
DC artists also created "Promotional Announcements"—a black-and-white version of its artists' cover art—to promote Action Comics #1. Br. at 12.	**Order on Motion for Partial Summary Judgment (SER-15):** Similarly, Detective Comics, Vol. 15, with a cover date of May, 1938, had a full-page black-and-white promotional advertisement on the comic's inside cover which contained within it a reproduction of the cover (again in a reduced scale) of the soon-to-be published first issue of Action Comics. (Also includes scanned image of announcement). **Declaration of Paul Levitz (SER-678):** At Detective's direction, Siegel and Shuster adapted and expanded their existing Superman strips into a format suitable for a comic book, and Detective announced the debut of its *Action Comics* series, and Superman, in full page announcements in its May, 1938 issues of some of its existing publications.
Starting in 2001, Toberoff, the self-described "rights-hunter," "movie producer," and "intellectual property entrepreneur," began pursuing Siegel's and Shuster's heirs. Br. at 28.	**Deposition testimony of Kevin Marks (SER-115-16):** Q. Your incoming phone log at GTRB 600 reflects a call from Mark Toberoff on November 29, 2001. . . . Was that call completed? A. No. Q. Did you at any time return that call? A. No. . . . Q. If you would turn, please, Mr.

Statement in Brief	Uncontested Record Evidence Cited
	Marks, to GTRB 604, that reflects a call from Mar[c] Toberoff, quote, "Re: Superman - potential buyout (end of November)." Did you speak with Mr. Toberoff on that day? A. Did you speak with Mr. Toberoff on that day? A. I don't know if I spoke with Mr. Toberoff that day. Q. Did you return that call at some subsequent time? A. I returned that call that day or subsequently, yes. Q. Can you tell me to the best of your recollection what Mr. Toberoff said during that conversation and what you said? A. Yes. I think Mr. Toberoff started the call by saying that he had called me earlier and that I hadn't returned his call, for which I apologized, and then he introduced himself. He said he was a lawyer and that he represented individuals that had interests in rights to movie and other properties that had come into those rights either by way of reversions under the law or reversions under Guild agreements. I also recall him saying that he had a separate company that was in the business of acquiring intellectual property rights. I recall him saying that he was interested in the Superman property and the Superboy property and had understood that I was representing the Siegel family interest, and he asked if he could talk to me about that. **Toberoff Timeline (SER-182-83):** In 2001, Marc Toberoff (MT) began

Statement in Brief	Uncontested Record Evidence Cited
	researching Superman, who had rights, etc. MT initially contacts Kevin Marks at Gang, Tyre, who represented Joanne and Laura Siegel with an offer for the Siegel rights. Marks discourages Toberoff from any advances, and does not tell Siegels initially of the interaction because he believes it is not in their best interest. On Nov. 23, 2001, MT entered into a joint venture agreement between his own outside corporation Pacific Pictures Corp. (NOT a law firm), and Mark Warren Peavy, and his mother Jean Peavy, heirs to the Joe Schuster estate. For the purposes of this document, we do not know the content of that agreement. MT and Ari Emanuel, partner and agent at Endeavor, contacts Kevin Marks at Gag, Tyre, Ramer, & Brown again, (who represented Joanne and Laura Siegel), on August 8, 2002. MT approaches the Siegels, *not as an attorney but as a film producer*, stating that he is "allied" with Emanuel, hoping such a claim will legitimize him. On August 8th 2002, MT tells Marks that he and Emanuel have a billionaire ready to offer $15 million dollars up-front, plus what they promise to be meaningful participation from proceeds for exploitation of the Siegels' rights to SUPERMAN and some continued royalties on an ongoing basis in all media.
In November 2001, he induced the Shusters to become his business partners and to repudiate their existing contractual	**Toberoff Timeline (SER-183):** On Nov. 23, 2001, MT entered into a joint venture agreement between his own

Statement in Brief	Uncontested Record Evidence Cited
arrangements with DC. Br. at 18.	outside corporation Pacific Pictures Corp. (NOT a law firm), and Mark Warren Peavy, and his mother Jean Peavy, heirs to the Joe Schuster estate. For the purposes of this document, we do not know the content of that agreement.
Marks rebuffed Toberoff, telling him in February, July, and August 2002 that Larson had made a deal with DC. Br. at 18.	**Deposition testimony of Kevin Marks (SER-115-16):** Q. Your incoming phone log at GTRB 600 reflects a call from Mark Toberoff on November 29, 2001. . . . Was that call completed? A. No. Q. Did you at any time return that call? A. No. . . . Q. If you would turn, please, Mr. Marks, to GTRB 604, that reflects a call from Mar[c] Toberoff, quote, "Re: Superman - potential buyout (end of November)." Did you speak with Mr. Toberoff on that day? A. Did you speak with Mr. Toberoff on that day? A. I don't know if I spoke with Mr. Toberoff that day. Q. Did you return that call at some subsequent time? A. I returned that call that day or subsequently, yes. Q. Can you tell me to the best of your recollection what Mr. Toberoff said during that conversation and what you said?

Statement in Brief	Uncontested Record Evidence Cited
	A. Yes. I think Mr. Toberoff started the call by saying that he had called me earlier and that I hadn't returned his call, for which I apologized, and then he introduced himself. He said he was a lawyer and that he represented individuals that had interests in rights to movie and other properties that had come into those rights either by way of reversions under the law or reversions under Guild agreements. I also recall him saying that he had a separate company that was in the business of acquiring intellectual property rights. I recall him saying that he was interested in the Superman property and the Superboy property and had understood that I was representing the Siegel family interest, and he asked if he could talk to me about that.
Toberoff insisted in August 2002 that Marks communicate to Larson that he and agent Emanuel had an unnamed "investor" willing to purchase her rights for $15 million cash and generous "back-end" compensation. Br. at 18.	**Deposition testimony of Kevin Marks (SER-122-24):** Q. [] Do you recall how long after August 7 that conference call took place? A. Within the next day or two. Q. I see. Would you tell me [] what was involved and what was said in that conversation? A. Yes. Mr. Toberoff and Mr. Emanuel both spoke. I can't completely tell you who said what, but I think Mr. Toberoff may have very briefly referenced past conversations, and then I believe it was Mr. Emanuel who explained that either they or some other people or perhaps some members of the Endeavor Talent Agency had set up a fund or were in the process of setting up a fund to acquire intellectual property rights

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	which they would then package with clients from the Endeavor Talent Agency, then take those to studios to exploit the package, and they understood that the Siegel family had an interest in the termination rights and viewed that as perhaps the most valuable of properties and wanted to make a proposal. Q. Okay. What did you say? A. I said in substance and effect, "I'm listening." And I'm not sure who spoke, but they made a proposal of $15 million and what was described as a meaningful back end, which I understood to be a contingent compensation position or a royalty position in the exploitation of the property. … Q. And what else did you say? A. I asked if there was anything else, and they said "no," and then I asked if this was a proposal that was conditioned on their doing due diligence about the rights, and they said again in substance and effect, "No, it's not. We've done our due diligence already. This is the offer." Q. Anything else you can recall of that conversation? A. I think I said, "Thank you, and I will communicate this to the client" or "take this back to the client." Q. And did you in fact do that? … A. Yes.
Marks conveyed this offer	**Toberoff Timeline (SER-183):**

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to Larson, but admonished her that she had a "deal" with DC, and if she repudiated it, Marks would have to "testify against [her] in court."[1] Br. at 18-19.	Marks conveys MT's offer to the Siegels, and Marks does say to the Siegels, it is a better offer than the one you have. However, Marks also tells the Siegels that he would testify in court against the Siegels if they accepted this offer because he believes there has already been an agreement reached.
But the promised $15 million investor never materialized, and Toberoff never produced any other buyers. Br. at 19.	**Deposition testimony of Kevin Marks (SER-184-87):** Q. [] Do you recall how long after August 7 that conference call took place? A. Within the next day or two. Q. I see. Would you tell me [] what was involved and what was said in that conversation? A. Yes. Mr. Toberoff and Mr. Emanuel both spoke. I can't completely tell you who said what, but I think Mr. Toberoff may have very briefly referenced past conversations, and then I believe it was Mr. Emanuel who explained that either they or some other people or perhaps some members of the Endeavor Talent Agency had set up a fund or were in the process of setting up a fund to acquire intellectual property rights which they would then package with clients from the Endeavor Talent Agency, then take those to studios to exploit the package, and they understood that the Siegel family had an interest in the termination rights and viewed that as perhaps the most valuable of properties and wanted to make a proposal. Q. Okay. What did you say? A. I said in substance and effect, "I'm

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	listening." And I'm not sure who spoke, but they made a proposal of $15 million and what was described as a meaningful back end, which I understood to be a contingent compensation position or a royalty position in the exploitation of the property. **Toberoff Timeline (SER-184-87) (emphases in original)**: Upon the Siegels signing the [October 2001 IPW] agreement, MT then tells Joanne and Laura that his mysterious billionaire has decided to invest elsewhere. In other words, MT makes himself the Siegels' attorney of record while he solicited them as a film producer, violating the rule that no lawyer may directly solicit business dealings. MT's sole intent was to become the Siegels' attorney, not to help the Siegels (as he had alleged) to make a movie in competition to Superman returns, which was then in development at Warner Brothers. … **Absolutely nothing is moving ahead with Siegel/Schuster rights and agreements because MT was never intending to do anything with rights other than litigate**. . . . MT never did want to make a movie, and exploit the rights. MT knows no one is going to invest in an outside movie project outside of Warner Brothers, though he uses Ari Emanuel, the agent, to legitimize his claims. … **Significantly, MT admits to Laura Siegel that there never was a billionaire**

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	willing to invest $15 million when he first approached them.
Instead, more than seven years of litigation ensued, and Toberoff—who became Larson's lawyer—stands to receive 40% of any recovery. Br. at 19.	**Toberoff Timeline (SER-187) (emphasis in original):** **In other words, MT decreases his contingency fee by 5% -- instead of getting 50%, he will get 45% [of the Siegel Superman interest]. Combined with the Schuster interest, the aggregate of any outcome in SUPERMAN litigation for Marc Toberoff personally becomes 47.5% of the entire Superman interest.**
Toberoff's entertainment company also secured a 50% ownership interest in the Shusters' putative rights—later trading that 50% ownership interest for a 50% contingency fee. Br. at 19 n.3.	**Toberoff Timeline (SER-186) (emphasis in original):** On October 27, 2003, MT uses PPC to enter into another agreement with the Joe Schuster's heirs: Mark Warren Peavy and Jean Peavy, in which PPC is "engaged as the Executor of the recently probated estate of Joseph Schuster." The agreement purports that PPC is the Peavys exclusive advisor "for the purpose of retrieving, enforcing, and exploiting all of Joe Schuster's rights . . . . in all of his creations . . . ." In this agreement, MT also names himself their attorney for any and all litigation or questions that should arise in regards to these Rights. MT also clearly delineates that PPC is NOT a law firm. And, lastly but most significantly, MT defines that any and all moneys and proceeds, in case or in kind, received from the enforcement, settlement, or exploitation of any of the Rights, ...any monies would be spit 50/50. **IN ESSENCE, MARC TOBEROFF NOW HAS A 25% STAKE IN SUPERMAN <u>PERSONALLY</u>**

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	BECAUSE OF HIS DEAL WITH THE SCHUSTERS THAT WAS MADE IN 2003. He gets -- under the guise of Pacific Pictures Corp -- the rights to retrieve and enforce and exploit Joe Schuster's interest in SUPERMAN. MT's alleged "firewall" between film producing and soliciting business as an attorney comes tumbling down.
DC's artists also created the cover of Action Comics #1, which introduces the Superman story that immediately follows. Br. at 62.	**Letter from Vin Sullivan to Siegel, dated February 22 (SER-388):** I'm enclosing a silverprint of the cover of Action Comics. You'll note that we already used one of those panel drawings of SUPERMAN, as you suggested in your recent letter.
Siegel and Shuster's additions were also created at DC's expense—Siegel and Shuster were paid for their Action Comics #1 contributions, and DC assumed the financial risk and burden of publishing, distributing, and marketing Action Comics #1. Br. at 68.	**Letter from Leibowitz to Siegel, dated September 28, 1938 (ER-425-27):** Also, take into consideration that when we decided to come out with Action Comics, we were taking a tremendous gamble involving many thousands of dollars. We had no assurance from anybody that Action Comics would not be a losing proposition - you took no such gamble. **March 1, 1938 Agreement (ER-917):** I, the undersigned, am an artist or author and have performed work for strip entitled "SUPERMAN." In consideration of $130 agreed to be paid me by you, I hereby sell and transfer such work and strip, all good will attached thereto and exclusive right to the use of the characters and story, continuity and title of strip contained therein,

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	to you and your assigns . . . . **Findings of Fact of the Westchester Court (ER-958-60):** 23. On March 1, 1938, prior to the printing of the first issue of "Action Comics," DETECTIVE COMICS, INC. wrote to plaintiff SIEGEL at Cleveland, Ohio, where he and plaintiff SHUSTER both resided, enclosing a check in the sum of $412. which included $130. in payment of the first thirteen page SUPERMAN release at the agreed rate of $10. per page, and a written instrument for plaintiffs' signatures. … 30. Upon receipt by DETECTIVE COMICS, INC. of the instrument of March 1, 1938 [], it published the first SUPERMAN release in the June, 1938 issue of "Action Comics," which magazine was issued for sale on April 18, 1938…. 35. Between March, 1938 and March, 1947 DETECTIVE COMICS, INC. expended large sums of money and devoted much time and effort in the promotion and popularization of the comic strip SUPERMAN and the names and characters appearing therein. **Letter from J.S. Leibowitz to Siegel, dated March 1, 1938 (SER-383):** Dear Mr. Siegel: I am enclosing a check for $412.00 for payment of the following: "Superman" - June issue $130.00 . . . .