

Appeal No. 11-55863

United States Court of Appeals

FOR THE

Ninth Circuit

Laura Siegel Larson,
Plaintiff, Counterclaim-Defendant, and Appellant

v.

Warner Bros. Entertainment Inc. and DC Comics,
Defendants, Counterclaimants, and Appellees

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)

MOTION BY APPELLEES
WARNER BROS. ENTERTAINMENT INC. AND DC COMICS
TO DISMISS INTERLOCUTORY APPEAL FOR LACK OF JURISDICTION

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INTRODUCTION

This Court lacks jurisdiction to hear this appeal because the Rule 54(b) judgment on appellant's First Claim For Relief does *not* entirely adjudicate that claim. "The partial adjudication of a single claim is not appealable, despite a rule 54(b) certification," *Ariz. State Carpenters Pension Trust Fund v. Miller*, 938 F.2d 1038, 1040 (9th Cir. 1991), and the Court can and should dismiss this appeal now for lack of jurisdiction, *id.* (dismissing appeal on this ground despite Rule 54(b) certification); *Wood v. GCC Bend, LLC*, 422 F.3d 873, 883 (9th Cir. 2005) (same).

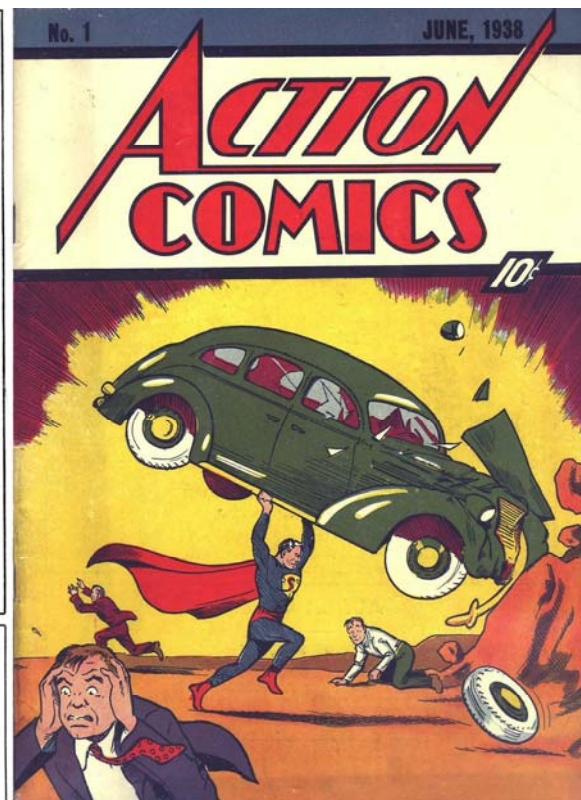
Whether a claim has been fully adjudicated is a question this Court reviews *de novo*. Here, appellant's First Claim seeks a judicial declaration defining the validity and scope of copyright termination notices she served concerning certain works embodying the Superman character that her father, Jerry Siegel, co-authored. Over the course of this litigation, the district court decided a series of *partial* summary judgment motions directed at this claim, *but never decided the entire claim*. As appellant has conceded, the court's rulings expressly left open key legal and factual questions concerning the "scope of [her] recaptured copyrights." Decl. of Matthew T. Kline ("Kline Decl.") Ex. S at 891.

One such contested issue presented by appellant's First Claim concerns whether and to what extent her rights in Superman were diminished by the district court's ruling that she did *not* terminate certain "promotional announcements" that

feature Superman and were published by appellees (“DC”) before *Action Comics No. 1*, the earliest work in which appellant claims rights. *Action Comics No. 1* is the first comic book that included a Superman story, but as seen in the promotional announcement below (and Appendix A), earlier comic books—owned exclusively by DC—feature the same iconic imagery on the cover of *Action Comics No. 1*:



Promotional Announcement



Cover of *Action Comics No. 1*

Indeed, in denying appellant’s first motion for a Rule 54(b) judgment on her First Claim, the district court ruled last October that this unresolved “‘promotional announcement’” issue, among others, “bear[s] directly on the finality of the [first] claim for declaratory relief which [appellant] move[s] to certify for appeal” and “forecloses a finding that [appellant’s] claim for declaratory relief is final.” *Id.* Ex.

W at 1026. In May 2011, appellant renewed her Rule 54(b) motion, and this time it was granted—even though the promotional announcement issue had *not* been adjudicated. In fact, *none* of the remaining contested issues under appellant’s First Claim had been decided. What *had* happened that prompted the district court to reverse its ruling was that appellant amended her complaint to remove *one* of the open issues from her First Claim—her request for an accounting, while retaining it as a part of her other claims. This manipulation of her pleadings, however, had no effect on the other open issues, nor did it render her First Claim final.

The Ninth Circuit uniformly has held that if *any* part of a claim remains undecided, there is no final judgment and a Rule 54(b) appeal is improper. *E.g.*, *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 954 (9th Cir. 2006). This is true even if the appeal would yield efficiencies. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956). Hence, appellant’s efficiency arguments for pursuing an interlocutory appeal are of no moment, nor are they meritorious:

- The parties’ respective claims that have *not* been appealed directly overlap with the claims on appeal;
- This busy Court should not be forced to wade through the 6 ½ years of record to address the many legal and factual rulings that have only partially been decided and require further development and analysis; and
- Appellant’s predictions that an appellate ruling might facilitate a settlement are neither correct nor confer appellate jurisdiction where none exists.

Addressing the merits of this complex appeal could take two years. In contrast, resolution of *all* of the remaining issues in the case can occur this calendar year,

enabling the parties to appeal—and this Court to consider the appeal—with the benefit of a fully litigated and adjudicated record.

FACTUAL BACKGROUND

Appellant is the daughter of Jerome Siegel, a Cleveland writer who co-created the first Superman story with artist Joseph Shuster in the 1930s. After Mr. Siegel died, appellant served, in April 1997, copyright termination notices on DC purporting to recapture a 50% co-ownership share of copyrights in more than 15,000 Superman works. Kline Decl. Ex. A. After years of negotiations with DC (during which DC contends a binding settlement agreement was reached), appellant sued DC in October 2004, seeking a declaration that her termination notices were valid and entitled her to an accounting of all Superman-related profits. *Id.* Ex. B. DC counterclaimed in November 2004, asserting, *inter alia*, that the notices were invalid and appellant's lawsuit was barred by the parties' 2001 settlement agreement and the three-year statute of limitations. *Id.* Ex. C.

A. Judge Larson's Rulings. After years of discovery and motion practice, the parties filed, in April 2007, *partial* motions for summary judgment on appellant's First Claim and DC's first five counterclaims. *Id.* Exs. D, E. In March 2008, the district court (the Hon. Stephen J. Larson, Ret.) issued a *partial* summary judgment ruling dismissing certain of DC's counterclaims, finding that appellant had failed to recapture the promotional announcement, and holding that appellant

recaptured 50% of the original copyrightable elements in the Superman story in *Action Comics No. 1*. *Id.* Ex. F. Extensive litigation ensued over the next three years to address the many questions left open by these partial rulings.¹

Following the March 2008 ruling, the parties continued to litigate appellant's First Claim for declaratory relief concerning what copyrights she recaptured, and those she did not, including Superman elements in the promotional announcements published before *Action Comics No. 1*. In addition to the unrecaptured elements in the promotional announcements, the district court's March 2008 ruling generally described the Superman elements appellant did recapture:

the entire storyline from Action Comics, Vol. 1, Superman's distinctive blue leotard (complete with its inverted triangular crest across the chest with a red "S" on a yellow background), a red cape and boots, and his superhuman ability to leap tall buildings, repel bullets, and run faster than a locomotive.... *Id.* at 322-23.

The court also described the vast Superman "universe" of story elements, characters, and super-powers to which appellant had *no claim*, including:

¹ Out of an abundance of caution in the event this motion is not granted, DC has filed a cross-appeal on its four counterclaims on which judgment entered. Like appellant's First Claim, DC's First Counterclaim addresses scope of copyright issues that have yet to be fully resolved. DC's other counterclaims—premised on its statute-of-limitations and "settlement" defenses—require further litigation below based on new developments that undercut the district court's rulings, including new factual positions recently taken by appellant and documents she was recently ordered to produce. Also, this Court's intervening opinion in *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904 (9th Cir. 2010), underscores the error in the district court's summary judgment rulings; in *Mattel*, as here, the same district court judge improperly adjudicated disputed fact questions about contractual intent on summary judgment.

- “[T]he more famous story elements now associated with Superman”;
- “Many of Superman’s powers that are among his most famous today,” including “his ability to fly,” “super-vision,” “super-hearing,” and “heat vision”;
- The evolution of “[t]he ‘scientific’ explanation for these powers”;
- “Some of the most famous supporting characters,” including “Jimmy Olsen,” “Lex Luthor, General Zod, and Brainiac”;
- The familiar five-sided version of “Superman’s crest”; and
- Nearly seventy years of material that “define[s], update[s], and develop[s] the [Superman] character (such as his origins, his relationships, and his powers and weaknesses).” *Id.* at 295-96.

This March 2008 ruling was a major setback for appellant, and in May 2008, she filed a motion challenging it, arguing that DC’s ownership of the promotional announcements did not diminish the copyrights she recaptured and that the court’s description of the copyrightable Superman elements that DC owned was both dicta and wrong. *Id.* Ex. G. The district court denied her motion, stating these “areas of inquiry” could be addressed in additional briefing and argument. *Id.* Ex. H.

B. Unresolved Questions Concerning Appellant’s Rights. In July 2008, the parties submitted “Additional Issues” briefing addressing these and other open issues—including the promotional announcement and dicta issues. *Id.* Exs. I-L. The district court heard oral argument in September 2008, but deferred a final ruling “until shortly before the time of” the accounting trial. *Id.* Ex. N at 737.

In August 2009, just before retiring from the bench, Judge Larson entered a further ruling concerning appellant’s recaptured copyrights, largely rejecting appellant’s bid to recapture additional Superman works beyond *Action Comics No. 1*. *Id.* Ex. P. In addition, the court found that DC retained 100% ownership in the

remaining Superman copyrights to which appellant asserted a claim—save for 50% of the copyrightable elements in the Superman comic in *Action Comics No. 4*; pages 3 to 6 of *Superman No. 1*; and two weeks of Superman newspaper strips from 1939. *Id.* The court, however, did not decide the promotional announcement or dicta issues. And, of course, the accounting trial remained.

On November 20, 2009, this case was assigned to the Hon. Otis D. Wright II. *Id.* Ex. R. On December 21, 2009, the parties provided Judge Wright with a 23-page joint status report detailing the open issues to be adjudicated, approaches on how to litigate them and conclude this case, and a proposal for resolving a related case involving the character “Superboy.” *Id.* Ex. S. *Nowhere* in this filing did appellant indicate that any of her claims for relief had been fully or finally adjudicated; nor did she suggest that her First Claim was final or appropriate for an interlocutory appeal. Quite the opposite, appellant said her “accounting claims” should be scheduled for trial after the Court resolved the remaining issues concerning “the scope of [her] recaptured copyrights,” citing the “promotional announcement” and “dicta” questions, among others. *Id.* at 886, 890-92.

C. Judge Wright’s Rulings On Appellant’s Rule 54 Motions. Before the district court could rule on the parties’ proposals for concluding the case, appellant reversed course and pursued a new strategy to abate the final stages of this case in favor of an immediate partial judgment on her First Claim, an ensuing appeal, and

a later return to the district court to litigate the remaining issues. In August 2010, appellant filed her first Rule 54 motion, asking to stay this case pending appeal, as well as a related case filed by DC against appellant and others known as the *Pacific Pictures* case. *Id.* Ex. T. DC opposed, pointing out, as *appellant* had acknowledged, that many issues remain unresolved in this case—and it appeared improper tactical reasons were behind appellant’s change in course.²

In October 2010, the district court denied appellant’s first Rule 54 motion without prejudice, identifying unresolved issues that “bear directly on the finality of” her First Claim. *Id.* Ex. W. These open issues included appellant’s request for an accounting on her First Claim; “the impact, if any, that Defendants’ pre-*Action Comics No. 1* ‘promotional announcement’ have on the scope of Plaintiffs’ recaptured copyrights”; and “[w]hether the Court’s background statements in its March 26, 2008 Partial Summary Judgment Order concerning the literary elements in *Action Comics No. 1* are dicta.” *Id.* Judge Wright held that any interlocutory

² *Id.* Ex. V at 9-11. The *Pacific Pictures* lawsuit, *id.* Ex. U, filed in May 2010, challenges a copyright termination notice served by the heirs of Joe Shuster and conduct by the Shusters, appellant, and their business partners. Appellant and her co-defendants sought to bar discovery in *Pacific Pictures*, and when the lower courts rejected their efforts, they unsuccessfully pursued two appeals and an writ in this Court. *Id.* Exs. LL-OO. It was in response to the *Pacific Pictures* case that appellant asserted new factual positions that validate DC’s statute-of-limitations defense. *E.g.*, *id.* Ex. X at 1038-39. Moreover, new documents appellant was ordered to produce in *Pacific Pictures* bear on DC’s settlement defense in this case and reinforce why Judge Larson’s summary judgment ruling on DC’s claims are in error. Hoping to avoid this discovery, defendants unsuccessfully sought to stay the *Pacific Pictures* case pending a Rule 54(b) appeal here. *Id.* Ex. PP at 1317-18.

appeal would be “premature” until these and other issues were decided. *Id.* at 1026. The parties thereafter submitted briefs addressing all the open issues and proposing procedures and schedules to address them. *Id.* Ex. X.

In response to the court’s order denying her Rule 54(b) motion, appellant requested and was granted leave to amend her complaint to remove from her First Claim—but retain elsewhere in her complaint—the express reference to an accounting for 50% “of any and all proceeds, compensation, monies, profits ... from ... any aspect of the Recaptured Copyrights....” *Compare id.* Ex. O ¶ 54(c), *with* Ex. Z ¶¶ 58(b), 67, 70, 74(b), 75(c), 76(a), 76(c), 78. The sole purpose of this cosmetic change was to support a renewed request for a partial judgment, interlocutory appeal, and stay of the case. *Id.* Ex. Y at 1043-49.

Despite the change, the First Claim still seeks a declaration defining the parties’ “respective rights and obligations with respect to the Termination and the copyright interests thereby recaptured by [appellant],” *id.* Ex. Z ¶ 55—relief that cannot be granted without deciding the open issues. Moreover, appellant’s request for an accounting remains logically and practically dependent on her First Claim. Nonetheless, in February 2011, appellant moved again for a Rule 54(b) judgment. In so doing, she did not dispute that the open issues discussed in the parties’ 2009 status report or the district court’s October 2010 order remained undecided. Rather, she said they did not affect her First Claim. *Id.* Ex. AA at 1090-92.

Over DC's objection, the district court granted appellant's Rule 54(b) motion on March 15, 2011, and entered final judgment on appellant's First Claim and DC's first four counterclaims. *Id.* Exs. CC, DD. It also stayed all further proceedings pending this appeal. *Id.*³

ARGUMENT

A. The Court Can And Should Immediately Dismiss This Appeal.

This Court's Rule 3-6 provides an appeal may be dismissed "[a]t any time," "if the court determines that the appeal is not within its jurisdiction." This Court has limited resources, and the parties have expended substantial effort over the past six years litigating this complicated case. Where, as here, there is no final judgment from which to appeal, the Court should dismiss the appeal at the outset, rather than after full merits briefing and argument. Indeed, "[i]t is the duty of this court to dismiss whenever it becomes apparent that [it] lack[s] jurisdiction."⁴

³ The district court subsequently vacated and then re-entered its Rule 54(b) judgment to make clear that its ruling did not affect the parties' claims in the related Superboy litigation. *Id.* Exs. EE, FF.

⁴ *U.S. v. Houser*, 804 F.2d 565, 568 (9th Cir. 1986). Appeals of improvidently granted judgments pursuant to Rule 54(b) are uniformly dismissed, *e.g.*, *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742-44 (1976); *Wood*, 422 F.3d at 883; *Miller*, 938 F.2d at 1040; *Morrison-Knudsen Co. v. Archer*, 655 F.2d 962, 966 (9th Cir. 1981); *State St. Bank & Trust Co. v. Brockrim, Inc.*, 87 F.3d 1487, 1490 (1st Cir. 1996); *PYCA Indus. v. Harrison Cnty. Waste Water Mgmt. Dist.*, 81 F.3d 1412, 1421 (5th Cir. 1996); *Gen. Acquisition v. GenCorp, Inc.*, 23 F.3d 1022, 1030 (6th Cir. 1994); *In re Lull Corp.*, 52 F.3d 787, 789 (8th Cir. 1995); *Ultra-Precision Mfg. v. Ford Motor Co.*, 338 F.3d 1353, 1358-59 (Fed. Cir. 2003); *Credit Francais Int'l, S.A. v. Bio-Vita, Ltd.*, 78 F.3d 698, 710 (1st Cir. 1996); *Braswell Shipyards v.*

B. This Court Lacks Jurisdiction To Hear Appellant's Appeal And Must Dismiss It Because Her First Claim Was Never Finally Decided.

1. Before this Court can exercise jurisdiction over an interlocutory appeal, it must determine *de novo* whether the claim sought to be appealed has been fully adjudicated. *See AmerisourceBergen*, 465 F.3d at 954. A final judgment must have been rendered on an *entire* claim; rulings on parts or elements of a claim do not establish the requisite finality for an appeal, even if a Rule 54 judgment has issued. *See Schudel v. Gen. Elec. Co.*, 120 F.3d 991, 994-95 (9th Cir. 1997); *W.L. Gore & Assocs., Inc. v. Int'l Med. Prosthetics Res. Assocs., Inc.*, 975 F.2d 858, 862 (Fed. Cir. 1992). This Court has full power to dismiss an appeal brought pursuant to a Rule 54 judgment and does so wherever a single claim has not been fully and finally resolved. *E.g.*, *Sears*, 351 U.S. at 435; *Schudel*, 120 F.3d at 994; *supra* n.4.

2. Appellant's First Claim, as last amended in February 2011, asserts:

53. ...[A]n actual and justiciable controversy has arisen and now exists between Plaintiffs and Defendants under Federal copyright law,

Beazer East, Inc., 2 F.3d 1331, 1339 (4th Cir. 1993); *Landry v. G.B.A.*, 762 F.2d 462, 463-64 (5th Cir. 1985); *Soliday v. Miami Cnty.*, 55 F.3d 1158, 1163 (6th Cir. 1995); *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 860 F.2d 1441, 1446 (7th Cir. 1988); *Rudd Constr. Equip. Co. v. Home Ins. Co.*, 711 F.2d 54, 56 (6th Cir. 1983); *Cadleway Props. v. Ossian State Bank*, 478 F.3d 767, 769-70 (7th Cir. 2007); *Monument Mgmt. Ltd. P'ship I v. Pearl*, 952 F.2d 883, 885 (5th Cir. 1992); *Tolson v. U.S.*, 732 F.2d 998, 1003 (D.C. Cir. 1984); *Sussex Drug Prods. v. Kanasco, Ltd.*, 920 F.2d 1150, 1156 (3d Cir. 1990); *Shipes v. Trinity Indus., Inc.*, 883 F.2d 339, 345 (5th Cir. 1989); *Armijo v. Atchison, Topeka & Santa Fe Ry. Co.*, 19 F.3d 547, 552 (10th Cir. 1994); *Chevron USA Inc. v. Sch. Bd. Vermilion Parish*, 294 F.3d 716, 720 (5th Cir. 2002); *Lottie v. W. Am. Ins. Co.*, 408 F.3d 935, 940 (7th Cir. 2005); *Hogan v. Consol. Rail Corp.*, 961 F.2d 1021, 1026 (2d Cir. 1991).

17 U.S.C. §§ 101 *et seq.*, concerning *their respective rights and interests in and to the copyright to various “Superman” works, for which Plaintiffs desire a declaration of rights.*

54. Plaintiffs contend and Defendants deny that:

a. The Notices of Termination terminated on April 16, 1999 all prior grants, assignments or transfers of copyrights for the extended renewal term in and to each and/or all of the Works (as defined in paragraph 39 hereinabove) to any of the Defendants and other parties duly served with the Notices of Termination, including their predecessors-in-interest; and

b. As of the effective Termination Date, April 16, 1999, Plaintiffs owned and continue to own an undivided fifty percent (50%) of the Recaptured Copyrights to each and/or all the Works for their renewal terms.

55. A declaration of the Court is necessary ... so that the parties may know their *respective rights and obligations with respect to the Termination and the copyright interests thereby recaptured by Plaintiffs*. Kline Decl. Ex. Z ¶¶ 53-55 (emphasis added).

As *appellant* admitted in December 2009, the undecided “promotional announcement” and “dicta” issues “impact ... the scope of [her] recaptured copyrights.” *Id.* Ex. S at 891. These open issues preclude a final judgment on the claims asserted in paragraphs 53 and 55 of appellant’s First Claim, which expressly seek a declaration concerning what “rights and interests” she owns. In denying appellant’s initial Rule 54 motion, Judge Wright agreed these open issues “foreclose[d] a finding that [Appellant’s first] claim for declaratory relief is final”:

[The First Claim] seeks a declaration to not only *clarify the parties’ “respective rights and obligations with respect to the Termination and the copyright interests thereby recaptured by Plaintiffs (SAC ¶ 55),* but also to establish Plaintiffs’ ownership of “an undivided fifty percent (50%) of the Recaptured Copyrights to each and/or all the Works for their renewal terms.” (*Id.* ¶ 54b.) *Until the effect of the “promotional announcements” on the scope of the recaptured*

copyrights is determined, however, and the “principles of apportionment” issue is settled (second and third issues identified above), the Court can neither declare the parties’ respective rights nor even begin to apportion profits, as Plaintiffs’ claim for declaratory relief seeks. *Id.* Ex. W at 1026 (italics and underlining added).

To circumvent this ruling, appellant amended her complaint in early 2011, striking the apportionment-of-profits and accounting claims from her First Claim. *Id.* Ex. Z (striking paragraph 54(c), which sought “(50%) of any and all proceeds [from] any aspect of the Recaptured Copyrights”). Although this amendment purported to cure the underlined portions of Judge Wright’s opinion, it did nothing to address the *italicized* portion concerning the need to “declare the parties’ respective rights.” Paragraphs 53 and 55 in appellant’s latest complaint remain unaltered and still seek a declaration concerning the scope of her and DC’s “respective rights.” The open scope-of-rights questions that Judge Larson deferred adjudicating *still preclude* a final judgment on the First Claim. To paraphrase Judge Wright’s October 2010 order, “Until the effect of the ‘promotional announcements’ on the scope of the recaptured copyrights is determined”—and there are others as well—“the Court can[not] declare the parties’ respective rights.”

Indeed, appellant conceded in December 2009 and elsewhere that these open issues directly impact the “scope” of her allegedly recaptured rights, asserting in various submissions that the district court still needs to determine:

- Whether “Superman’s ‘Super-strength’ is part of the recaptured *Action Comics No. 1* character and story.” *Id.* Ex. J at 591-92. Appellant argued

DC's ownership of the promotional ads (which depict Superman holding a car over his head) “must not in any way affect the scope of any copyright protection” in *Action Comics No. 1*, including “super strength,” *id.* at 585.

- Whether “some of the elements listed in the Court’s Order as among ‘Superman’s powers’” that DC owns in fact “appear” in *Action Comics No. 1* and “are included in the copyrightable elements recaptured by Plaintiffs’ termination, notably Superman’s ‘super-senses.’” *Id.* at 594.
- “Whether and to what extent mixed uses of trademarks and copyright fall within the scope of what Plaintiffs regained through their termination notices.” *Id.* Ex. S at 885.
- “Whether and to what extent post-termination alterations to pre-termination derivative works fall within the scope of what Plaintiffs regained through their termination notices.” *Id.*⁵

In amending her complaint and obtaining judgment on her First Claim, appellant did not withdraw any of these claims. Nor did she contend they had been litigated to conclusion. For good reason—they have not been adjudicated and remain significant components of the rights and obligations that appellant seeks to have declared in her First Claim. And they continue to foreclose a finding that the First Claim is fully adjudicated.⁶

⁵ Appellant also asserted in her “Additional Issues” briefing that she owned the copyrightable story elements of Superman’s “super-vision” and “flight” because she said they are implied in *Action Comics No. 1*. *Id.* Ex. J at 595-96 & n.74. Her own expert disavowed this claim, *id.* Ex. M at 726-27, and Judge Larson rejected it, *supra* 6, but appellant maintained this was still an “open issue,” *id.* Ex. S at 891.

⁶ *E.g.*, *Schudel*, 120 F.3d at 994 (dismissing Rule 54(b) appeal where court below only resolved the *majority* of plaintiff’s claim); *Miller*, 938 F.2d at 1040.

3. Appellant now insists the open issues have no bearing on the declaration of rights she seeks in her First Claim. Disregarding that this is precisely the opposite of what she contended for years, appellant’s position proceeds from a newly minted distinction between copyrighted “works” and the “contents” of those works. Appellant argues that her “First Claim asks only for declaratory relief as to which Superman *works* (e.g., *Action Comics*, No. 1) were recaptured by the Termination, not their precise literary contents.” Kline Decl. Ex. AA at 1093.

This distinction is unsupported in the record and the law. Appellant has never recaptured *any* “work,” as she now defines that term—only individual elements within certain comic books and newspapers. *Action Comics No. 1* spans 68 pages and contains 10 different stories, involving many different characters *other* than Superman. *Id.* Ex. II. The district court held she recaptured elements contained in one, 13-page Superman story in *Action Comics No. 1*, but reduced (by a yet-to-be-resolved degree) by the elements in DC’s promotional announcements. *Id.* Ex. F at 308-23. Similarly, the court never ruled that appellant recaptured all of *Superman No. 1*, but pages 3 through 6—a fraction of the “work,” as appellant uses the word. *Id.* Ex. P at 797-804; Ex. KK. The same is true of *Action Comics No. 4*; Judge Larson’s ruling implicates only 13 of 68 pages. *Id.* Ex. P at 797-803.

Indeed, appellant’s own complaint proceeds from the premise that a “work” does not exist separate and apart from the copyrightable elements that comprise it.

She defines “Works” to include “the copyrightable ‘Superman’ character” and “the material” in Superman publications. *Id.* Ex. Z ¶ 39. Appellant maintained this position throughout the litigation below—that is, before she tactically decided to reverse course and pursue this appeal. Thus, when DC argued appellant could not recapture certain newspaper strips not listed in her termination notice, she argued successfully, that her failure to list those “works” was irrelevant, Ex. Q at 868-70, because the notice identified the *Superman elements* underlying those works:

This Notice of Termination applies to each and every work ... that includes or embodies any character, story element, or indicia reasonably associated with SUPERMAN or the SUPERMAN stories, such as, without limitation, Superman, Clark Kent, Lois Lane....

Id. Ex. A at 11. Indeed, she argued the relevant inquiry was whether her notice “reasonably puts the terminated party on notice of the character being terminated,” as opposed to the “works” (her position now). *Id.* Ex. Q at 870 n.10.

Appellant’s distinction also does not comport with copyright law. Copyright protection does not extend to the “material object”—*e.g.*, a comic book—embodying protectable material. 17 U.S.C. § 202. While the Copyright Act refers to “works” of authorship, “copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991). For this reason, the initial inquiry in an infringement case, for example, is to identify the “constituent elements” of plaintiff’s work, followed by an analysis of whether defendant copied

any of those elements. *Id.* at 361; *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004). In this case, the requisite analysis is only partially done. Identifying the “Works” that have been recaptured is only the first step. As appellant has repeatedly conceded, her First Claim also seeks a declaration as to the scope and extent of rights *within* the recaptured works. *E.g.*, Kline Decl. Ex. Z ¶ 55.

4. Finally, even as amended, appellant’s First Claim seeks “costs” and “attorneys’ fees,” *id.* ¶¶ 80-82—monetary relief that has never been adjudicated and cannot be awarded short of resolution of the remaining issues, including an accounting trial. A Rule 54 judgment is improper when such open issues remain.⁷

C. Efficiency Concerns Require Dismissal As Well.

“[O]nly after” appellant establishes a fully adjudicated claim to pursue on a Rule 54(b) appeal, may a court consider efficiencies in allowing such an appeal. *Gregorian v. Izvestia*, 871 F.2d 1515, 1519 (9th Cir. 1989). Here, the district court ruled such an appeal would be efficient, Kline Decl. Ex. GG, and this assessment is reviewed for clear error, *AmerisourceBergen*, 465 F.3d at 954. But given that appellant’s First Claim has not been fully adjudicated, efficiencies are irrelevant,

⁷ *E.g.*, *Wolf v. Banco Nacional de Mexico, S.A.*, 721 F.2d 660, 662 (9th Cir. 1983); *RD Legal Funding, LLC v. Erwin & Balingit, LLP*, 2010 WL 1416968, at *1 (S.D. Cal. 2010). Appellant contends that *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), and *Int’l Assoc. of Bridge, Structural, Ornamental, & Reinforcing Ironworkers’ Local Union 75 v. Madison Indus., Inc.*, 733 F.2d 656 (9th Cir. 1984), permit a judgment to be “final” for purposes of appeal despite such unresolved issues. Yet neither case addresses a Rule 54(b) judgment nor the unique efficiency concerns implicated by an interlocutory appeal.

Schudel, 120 F.3d at 995, and the court’s assessment was erroneous in any event.

A “similarity of legal or factual issues” between the claim being appealed and the remaining claims in a case “weigh[s] heavily against entry of judgment” under Rule 54(b). *Cadillac Fairview/Calif., Inc. v. U.S.*, 41 F.3d 562, 567 (9th Cir. 1994). Appellant’s First through Fourth Claims all turn on the scope of appellant’s recaptured copyrights and her ability to trace what she recaptured to new Superman works that post-date the termination. *E.g.*, *Mattel*, 616 F.3d at 911. Until her change in strategy, appellant *always* treated these four claims as unified “accounting claims” to be tried together in one trial. *E.g.*, Kline Decl. Ex. S at 886.

Nothing has changed to alter that truth. If this appeal is not dismissed, this Court will be forced to hear this case at least twice—both before and after the litigation of the remaining open issues, including the accounting trial. Appellant’s approach thus guarantees two appeals and untold years to conclude the case. If this appeal is immediately dismissed, one accounting trial can be held, the case can be completed this year, and there can be a single appeal of all issues challenged on a full record. *Id.* Ex. BB. at 1117-20.

To be clear, it is this finality that appellant seeks to avoid. Appellant has recaptured only a limited sliver of rights, and she lost an earlier trial in the district court seeking money from DC’s corporate affiliates. *Id.* at 1109. As a result, appellant is keenly aware that an accounting trial will yield only a modest

recovery. She now prefers to avert this trial in the hope of first securing greater rights in this Court. Indeed, as discovery in the *Pacific Pictures* case has revealed, when other motion picture studios declined to purchase her rights last spring, she promised greater rights could be procured by an appeal. *Id.* at 1118-19.

No matter what appellant's tactical objectives, putting a sudden halt to this case just as it is drawing to a final close after over six years of litigation would result in inexcusable delay, inefficiency for the parties and courts, and severe prejudice to DC. And while the district court noted that a Rule 54(b) appeal would "conserve judicial resources" by avoiding the risk of having to "re-do" the accounting trial, *id.* Ex. CC at 1136, that same risk is inherent in *every* case involving a liability and damages component. Finally, despite appellant's claim that this appeal will promote settlement, only the finality of the case below, with a concrete outcome on all issues, claims, and monetary amounts, will facilitate settlement—not months of delay and uncertainty as these appeals are briefed, argued, and then decided, on an impartial, incomplete, and disputed record.

CONCLUSION

The district court's Rule 54 judgment should be vacated, and this appeal should be immediately dismissed for lack of jurisdiction.

Dated: June 28, 2011

O'MELVENY & MYERS LLP

By: /s/ Daniel M. Petrocelli

Daniel M. Petrocelli

Appendix A

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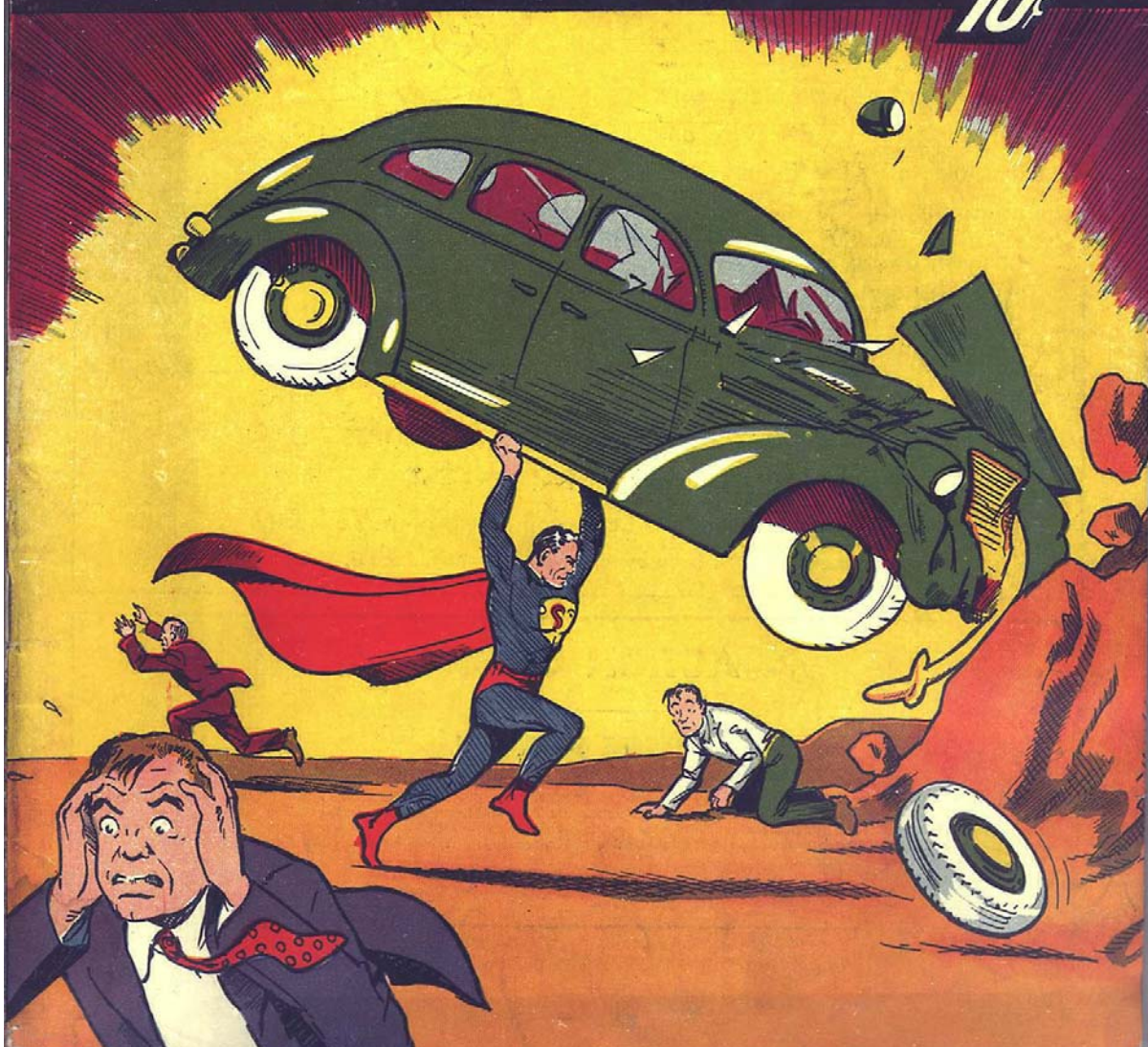
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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellees Warner Bros. Entertainment Inc. and DC Comics hereby identify one related case pending in the Ninth Circuit Court of Appeals that arises out of the same case in the district court: *Laura Larson v. Warner Bros. Entertainment Inc. et al.*, Appeal No. 11-56034.

Dated: June 28, 2011

O'MELVENY & MYERS LLP

By: /s/ Daniel M. Petrocelli

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d) and 32(a), I certify that appellees Warner Bros. Entertainment Inc. and DC Comics' brief is proportionately spaced, has a typeface of 14 points or more, and does not exceed 20 pages.

Dated: June 28, 2011

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