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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

JOANNE SIEGEL and LAURA SIEGEL
LARSON,

Plaintiffs;

v.

TIME WARNER INC.; WARNER
COMMUNICATIONS INC.; WARNER
ENTERTAINMENT INC.; WARNER BROS.
TELEVISION PRODUCTION INC.; DC
COMICS; and DOES 1-10,

Defendants.

AND RELATED COUNTER-CLAIMS

Case No. CV-04-8700 ODW (RZx)
Case No. CV-04-8776 ODW (RZx)

Hon. Otis D. Wright II, U.S.D.J

JOINT STATUS REPORT

1 Plaintiffs Joanne Siegel and Laura Siegel Larson (collectively, "Plaintiffs") and
2 Defendants Time Warner Inc. ("Time-Warner"), Warner Communications Inc., Warner
3 Bros. Entertainment, Inc. ("Warner Bros."), Warner Bros. Television Production Inc., and
4 Defendant and Counterclaimant DC Comics ("DC") (collectively, "Defendants") hereby
5 submit this joint status report in Cases Nos. CV 04-8400 (the "Superman Action") and CV
6 04-8776 (the "Superboy Action"), as directed by the Court.¹

7 Plaintiffs Joanne Siegel and Laura Siegel Larson are the widow and daughter,
8 respectively, of Jerome Siegel ("Siegel") who, with Joseph Shuster ("Shuster"), co-created
9 Superman. Siegel and Shuster co-authored the first Superman comic book story which
10 was later published in 1938 by Detective Comics, Inc. ("Detective"), the predecessor of
11 defendant DC Comics, in a new publication entitled *Action Comics No. 1*. By agreement
12 dated March 1, 1938, Siegel and Shuster granted to Detective all worldwide rights in their
13 Superman story and character, and Detective exploited those rights in various media over
14 the next seventy years. During the period at issue, from 1938 to 1943, Siegel and Shuster
15 wrote, hundreds of additional Superman comic book stories published by Detective, and
16 hundreds of Superman newspaper strips syndicated by the McClure Newspaper Syndicate.

17 The 1976 Copyright Act, which became effective on January 1, 1978, provided
18 authors and their families with new rights to recapture the author's original copyright(s)
19 for the extended renewal term by noticing the termination of previous grants of copyright.
20 See 17 U.S.C. §§ 304(c), 304(d), 203(a). Pursuant to 304(c) of the 1976 Act, Plaintiffs
21 served notices of termination with respect to Superman and Superboy ("Termination
22 Notices" or "Terminations") on Defendants on April 3, 1997, and November 8, 2002,
23 respectively, and filed such notices with the U.S. Copyright Office, pertaining to Siegel's
24 alleged copyright interest in Superman and Superboy that had been the subject of certain
25 grants. Pursuant to section 304(c), the Superman Termination Notices set forth an

26 ¹ The parties have worked in good faith to prepare a mutually acceptable joint statement and
27 agree that neither party will be prejudiced by the descriptions of the claims, defenses, and
28 arguments presented herein.

1 effective Termination date of April 16, 1999, and the Superboy Termination Notices set
2 forth an effective Termination date of November 17, 2004.

3 Defendants challenged the scope and effectiveness of Plaintiffs' Superman and
4 Superboy Termination Notices. In response, Plaintiffs initiated, in October 2004, the
5 Superman Action and the Superboy Action for declaratory relief as to the validity of the
6 Superman and Superboy Terminations, respectively, and additional claims.

7 Superman is considered a joint work under the Copyright Act because it was co-
8 authored by Siegel and Shuster. As such, each co-author originally owned an undivided
9 50% interest in such joint work's copyright. Joint owners of a copyright each have the
10 non-exclusive right to exploit such copyright subject to a duty to account to one another.
11 The Superman Termination Notices related to Siegel's (but not his co-author Shuster's)
12 50% interest in the Superman copyrights. Therefore, because DC is currently still the
13 successor of Shuster's joint copyright interest, the Superman Action is principally an
14 action for an accounting of Plaintiffs' allocable share of profits from the exploitation of
15 Plaintiffs' recaptured Siegel Superman copyrights after April 16, 1999, the noticed
16 Superman Termination date.

17 The Superboy Action, in contrast, is based on Siegel's alleged sole authorship of the
18 original Superboy story, and is therefore principally a copyright infringement action, based
19 on Defendants' alleged exploitation of the allegedly recaptured Superboy copyrights after
20 November 17, 2004, the noticed Superboy Termination date.

21 In the more than five years since Plaintiffs filed their actions, the Court has issued a
22 number of wide-ranging opinions that have substantially refined and narrowed the issues
23 presented. In the sections that follow, we set forth the procedural history of each case,
24 describing the issues that have been determined along with the issues that remain pending.

25 **I. The Superman Action (Case No. CV 04-8400).**

26 On April 3, 1997, Plaintiffs served seven notices of termination pursuant to 17
27 U.S.C. § 304(c), all effective as of April 16, 1999, purporting to terminate Siegel's
28 copyright grants to DC's predecessors in the Superman character and comic book series

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1 dating back to 1938.

2 Plaintiffs filed their initial Complaint in the Superman Action on October 4, 2004.

3 The Complaint contained the following causes of action:

- 4 • Plaintiffs' First Cause of Action sought declaratory relief to affirm the validity of
5 Plaintiffs' Superman Termination Notices pursuant to 17 U.S.C. § 304(c), and to
6 declare that Plaintiffs, having recaptured Siegel's fifty percent share of the original
7 Superman copyrights, were entitled to an accounting from Defendants for fifty
8 percent of their profits from the continued exploitation of the recaptured Superman
9 copyrights after April 16, 1999;
- 10 • Plaintiffs' Second Cause of Action sought declaratory relief as to the scope of
11 Defendants' duty to account to Plaintiffs for post-April 16, 1999 profits from
12 exploitation of Plaintiffs' recaptured Superman copyrights, including declarations:
13 (a) that Defendants' duty to account extends to profits from foreign territories based
14 on "predicate acts" in the United States; (b) that "apportionment" is applicable to
15 copyright *infringement* claims actions and not to an accounting of profits between
16 joint copyright owners; (c) that if apportionment is held to apply, its application
17 should be limited to derivative Superman works created by the accounting
18 Defendant(s), but not to passive Superman licensing by such accounting Defendant;
19 (d) that profits should include profits from any derivative Superman works created,
20 produced or manufactured on or after the effective Termination date; (e) that profits
21 should not be limited to the Superman profits of Warner Bros.' wholly owned
22 subsidiary, DC, but should include Superman profits of Warner Bros. and Time-
23 Warner as well; and (f) that, in determining profits, deductible costs should be
24 limited to those customarily deducted in arm's-length agreements and comply with
25 Generally-Accepted Accounting Principles ("GAAP");
- 26 • Plaintiffs' Third Cause of Action sought a declaration that Defendants have a duty
27 to account for post-April 16, 1999 exploitation of the Superman "crest" and/or
28 Superman "shield" on the ground that they are copyrighted works derivative of the

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1 copyrighted Superman crest in *Action Comics No. 1*;

- 2 • Plaintiffs' Fourth Cause of Action sought an accounting from all Defendants for
3 their respective exploitation of recaptured Superman copyrights after the effective
4 Termination date;
- 5 • Plaintiffs' Fifth Cause of Action alleged a claim for waste of the recaptured
6 Superman copyrights after the effective Termination date;
- 7 • Plaintiffs' Sixth Cause of Action alleged that Defendants violated the Lanham Act
8 by falsely representing exclusive ownership of Superman after the noticed
9 Termination date;²
- 10 • Plaintiffs' Seventh Cause of Action alleged that Defendants violated California
11 Business and Professions Code §§ 17200 *et seq.* by omitting the Terminations from
12 Time-Warner's public financial disclosures.

13
14 Defendants filed their initial Answer and Counterclaims in the Superman Action on
15 November 22, 2004. Defendant DC Comics asserted the following counterclaims:

- 16 • DC's First Counterclaim requested declaratory relief that the Termination Notices
17 are ineffective, alleging five independent reasons: (a) Plaintiffs did not send a
18 notice of termination with respect to a May 21, 1948 Consent Agreement; (b)
19 Plaintiff Joanne Siegel continued to accept benefits under a December 23, 1975
20 agreement, although she served a termination notice listing that agreement; (c)
21 Plaintiffs' Superboy Notice was ineffective because it was based on works that were
22 unpublished and therefore not subject to termination because they were neither in
23 their first nor their second term of copyright as of January 1, 1978, as required by 17
24 U.S.C. § 304(c); (d) Siegel's Superboy proposal and story sent to DC's predecessor-
25 in-interest were either prepared without the authorization of the copyright owner

26
27 ² Plaintiffs did not include the Fifth and Sixth Causes of Action in their Second Amended
28 Complaint, which was filed on October 8, 2008, with the Court's permission. Defendants filed
their Answer to Plaintiffs' Second Amended Complaint on October 20, 2008.

1 and/or were “works made for hire,” and therefore Siegel did not own any copyright
2 interest therein that would be subject to copyright termination; and (e) the Superman
3 Termination Notices were not timely served;

4 • DC’s Second Counterclaim requested a declaration that the Siegels’ claims are
5 barred by the statute of limitations;

6 • DC’s Third and Fourth Counterclaims alleged that the parties had entered into a
7 settlement agreement that the Siegels had repudiated,

8 • DC’s Fifth Counterclaim alleged on the basis of various limitations provided in
9 section 304(c) that the Court limit the scope and reach of the Superman and
10 Superboy notices in the following seven ways: (a) Plaintiffs failed to terminate
11 certain Superman Ads published prior to the publication of *Action Comics No. 1*, so
12 that the copyrights therein are still exclusively owned by DC Comics; (b) DC
13 Comics retains the rights to exploit Superman “derivative works” prepared prior to
14 the effective dates of the Superman and Superboy Notices; (c) DC owns all
15 copyrights in post-*Action Comics No. 1* “derivative works,” including new super
16 powers, villains, components to the Superman universe, or any other new Superman
17 elements contained therein; (d) Superboy is a “derivative work” based on Superman;
18 (e) Superboy is a joint work of authorship; (f) the television show “Smallville” is not
19 derived from the Siegel Superboy Submissions or any other Superboy work
20 exploited prior to May 21, 1948; and (g) certain “Additional Action Comics No. 1
21 Materials” were works made for hire;

22 • DC’s Sixth Counterclaim sought a determination regarding the application of a
23 number of accounting principles in the event that the Superman Termination Notices
24 and/or Superboy Termination Notice were deemed valid and effective.

25
26 The parties subsequently entered into a stipulation permitting Plaintiffs to file their
27 First Amended Complaint and permitting Defendants to file their First Amended
28 Counterclaims, and the Court adopted the stipulation on October 18, 2005.

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1 Plaintiffs' First Amended Complaint largely tracked their initial complaint, except
2 for substantive amendments to Plaintiffs' sixth cause of action under the Lanham Act.

3 Defendants' First Amended Counterclaims contained additional allegations
4 concerning Defendants' alleged "settlement" defense. Defendants filed their Answer to
5 Plaintiffs' First Amended Complaint on November 1, 2005. Plaintiffs filed their Reply to
6 Defendants' First Amended Counterclaims on November 4, 2005.

7 **A. The Parties' April 30, 2007 Partial Summary Judgment Motions.**

8 On April 30, 2007, the parties filed cross-motions for partial summary judgment in
9 the Superman Action. Plaintiffs sought partial summary judgment as follows:

- 10 • That Defendants' Third and Fourth Alternative Counterclaims should be dismissed
11 because the parties failed to consummate a binding settlement agreement;
- 12 • That the Superman Termination is valid as a matter of law with respect to at least
13 the original Superman story published in *Action Comics No. 1*, and that Plaintiffs
14 have thereby recaptured Siegel's co-authorship share of the copyrights therein;
- 15 • That the defenses to the Terminations alleged in Defendants' First and Second
16 Alternative Counterclaims and parts of their Fifth Alternative Counterclaim lacked
17 merit because: (a) Siegel and Shuster's Superman story published in *Action Comics*
18 *No. 1* is not a "work made for hire" as it was independently created by them long
19 before their relationship with Detective; (b) that a May 21, 1948 consent judgment
20 need not have been listed in Plaintiffs' Termination Notices because it was not a
21 copyright grant and, in any event, is duplicative of the May 19, 1948 stipulation
22 listed in the Termination Notices; (c) that the December 23, 1975 agreement, was
23 not a copyright grant and, in any event, Plaintiff Joanne Siegel's acceptance of
24 certain pension benefits from Defendants did not reinstate any copyright grants; (d)
25 that the Superman Termination was timely served; and (e) that the Superman
26 Termination is not barred by the statute of limitations; and
- 27 • That Plaintiffs are entitled to an accounting of all profits earned from Plaintiffs'
28 recaptured Superman copyrights in the United States and in foreign territories (to the

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1 extent such foreign profits are based on Defendants' predicate acts in the United
2 States).

3
4 Defendants sought partial summary judgment as follows:

- 5 • That Plaintiffs have no right under the Copyright Act to share in Defendants' profits
6 derived (a) from the foreign exploitation of any Superman work, including
7 "Superboy," or any other juvenile version of Superman, (b) from the exploitation of
8 the Superman family of trademarks, or (c) from the continued exploitation of any
9 Superman "derivative work," including "Superboy," or any other juvenile version of
10 Superman, created prior to the effective dates of Plaintiffs' Terminations;
11 • That as a result of Plaintiffs' alleged failure to terminate certain copyrighted works
12 as prescribed by the Copyright Act, Defendants remain free to use such
13 untermiated works and the elements contained therein without accounting to
14 Plaintiffs and without liability for copyright infringement; and
15 • That neither Warner Bros. nor Time-Warner is the "alter ego" of DC, and Plaintiffs
16 therefore are not entitled to reach any Superman-related profits of either of these
17 two Defendants.

18
19 The Court issued its ruling on the parties' partial summary judgment motions on
20 March 26, 2008.

21 The Court granted Plaintiffs' motion with respect to Defendants' work-for-hire
22 defense, concluding that "all the Superman material contained in Action Comics, Vol. 1, is
23 not a work-made-for-hire and therefore is subject to termination." *Siegel v. Warner Bros.*
24 *Ent. Inc.*, 542 F.Supp.2d 1098, 1130 (C.D. Cal. 2008) ("*Siegel II*"). The court also granted
25 Plaintiffs' motion in holding that Plaintiffs' omission of the 1948 consent judgment in the
26 Termination Notices did not diminish or invalidate the Notices. *Id.* at 1132. The Court
27 likewise granted Plaintiffs' motion that Joanne Siegel's continued acceptance of benefits
28 under the parties' 1975 agreement did not constitute a "grant" of copyrights under section

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1 304(c)(6)(D) and had no effect on Plaintiffs' Terminations. *Id.* at 1134. The Court also
2 granted Plaintiffs' motion in denying Defendants' statute of limitations defense, holding
3 that Plaintiffs' action was timely filed. *Id.* at 1136. The Court likewise granted Plaintiffs'
4 motion in denying Defendants' defense that the parties had allegedly entered into a
5 binding settlement agreement in 2001, ruling that "the parties' settlement negotiations did
6 not result in an enforceable agreement." *Id.* at 1139.

7 The Court granted Defendants' motion in ruling that certain "promotional
8 announcements," due to their earlier publication, fell outside the statutory time "window"
9 of Plaintiffs' Termination Notices. *Id.* at 1126. The Court defined the scope of the
10 elements in the Promotional Announcements. *Id.*

11 In addition, the Court granted Defendants' motion on the foreign profits issue and
12 denied Plaintiffs' motion, ruling that the "the termination notice is not effective as to ...
13 defendants' exploitation of the work abroad," and that therefore Defendants "must account
14 to plaintiffs only for the profits from such domestic exploitation of the Superman
15 copyright." *Id.* at 1142. The Court also granted Defendants' motion that "plaintiffs cannot
16 share in defendants' profits 'purely attributable to [Superman] trademark rights,'" but
17 preserved the issue of Defendants' "accounting [for] the mixed use of trademark and
18 copyright." The Court also granted Defendants' motion that Plaintiffs' accounting "should
19 not include any profits attributable to the 'post-termination exploitation of [Superman]
20 derivative works prepared prior to termination,'" but preserved the issue as to the extent a
21 post-termination "alteration [of] pre-termination derivative works" creates a post-
22 termination derivative work for which Defendants must account. *Id.*

23 The Court denied Defendants' motion to dismiss Plaintiffs' "alter ego" claims,
24 holding that "whether the license fees paid [to DC Comics for the Superman rights]
25 represents the fair market value therefor, or whether the license for the works between the
26 entities was a 'sweetheart deal,' are questions of fact that are not answered on summary
27 judgment...." *Id.* at 1145.

28 Both parties moved for clarification and/or reconsideration of certain portions of the

1 Court's March 26, 2008 Partial Summary Judgment Order. Defendants' motion (Docket
2 Entry #307) requested that the Court reconsider its statement regarding the scope of
3 copyrightable material contained in the "promotional announcements." Plaintiffs' motion
4 (Docket Entry # 300, 312) requested that the Court "(a) clarify that Defendants did not
5 secure any copyrightable Superman elements via the 'promotional announcements;'" and
6 (b) clarify that the promotional announcements did not detract from Plaintiffs' recaptured
7 Superman copyrights. Plaintiffs also sought clarification that the Court's statements in the
8 background section of its order regarding the Superman elements it did not see in *Action*
9 *Comics No. 1* were *dicta*, on the ground that this literary issue had not been joined.

10 On July 3, 2008, the Court issued an order denying Defendants' motion. In denying
11 Defendants' motion, the Court "affirm[ed] its conclusion on the scope of the copyrightable
12 material contained in those [promotional] announcements." Order at 3-4. The Court
13 denied Plaintiffs' motion, but without prejudice, stating that "[s]hould plaintiffs wish for
14 the Court to deal with the questions identified in their motion, they may append them to
15 those issues identified in the March 31, 2008 Order requiring further briefing." Order at 4.
16 See Discussion of Additional Issues Briefing in Section I(B), *infra*.

17 **B. Additional Issues Briefing.**

18 On February 21, 2008, a month before the Court issued its March 26, 2008 Partial
19 Summary Judgment Order, the parties filed a stipulation with the Court, requesting that it
20 accept briefing on and decide certain "Additional Issues" that would substantially impact
21 the nature, conduct and length of the trial, as well as the parties' pre-trial preparations.
22 The Additional Issues were:

- 23 • If Plaintiffs are successful in their Superman copyright termination claim, is
24 Plaintiffs' share of post-termination profits as a joint owner of the recaptured
25 Superman copyright(s) subject to reduction via an "apportionment" analysis?
26 • If Plaintiffs are successful in their Superman copyright termination claim, are the
27 following to be determined by the Court or by the jury: (a) the amount of post-
28 termination Superman profits at issue and (b) the degree, if any, to which Plaintiffs'

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1 share of such profits should be reduced by “apportionment”?

- 2 • If an “apportionment” analysis is held to be appropriate, is the trier of fact (be it the
3 Court or the jury) required to make a separate and independent apportionment
4 determination, if any, for each post-termination Superman work?
- 5 • Do Plaintiffs or Defendants bear the burden of proof on (a) the issue of Defendants’
6 profits, and (b) the issue of the apportionment, if any, of those profits?
- 7 • If Plaintiffs are successful in their Superman copyright termination claim, are
8 Plaintiffs only entitled to profits derived from Plaintiffs’ recaptured copyright
9 interest in *Action Comics No. 1*; that is, was Jerome Siegel’s contribution on all
10 subsequent Superman works (within the termination “window”) as a “work-made-
11 for-hire” and accordingly not subject to termination?

12
13 In a March 31, 2008 Order, issued several days after the Court’s Partial Summary
14 Judgment Order, the Court ordered the parties to engage in settlement mediation, and
15 stated that it would set a briefing schedule for the Additional Issues if the parties were
16 unable to reach a settlement.³ The Court also requested that the parties brief (along with
17 the Additional Issues) the following issues that had been left unresolved by the Court’s
18 March 26, 2008 Partial Summary Judgment Order:

- 19 • Whether and to what extent post-termination alterations to pre-termination
20 derivative works fall within the scope of what Plaintiffs regained through their
21 termination notices; and
- 22 • Whether and to what extent mixed uses of trademarks and copyright fall within the
23 scope of what Plaintiffs regained through their termination notices.

24
25 Pursuant to the Court’s July 3, 2008 Order regarding Plaintiffs’ motion for
26 clarification, Plaintiffs also re-briefed the issues of (a) the scope of Defendants’ rights

27
28 ³ The parties’ mediation efforts are described in Section III below.

1 based on the “promotional announcements,” and (b) whether the Court’s background
2 statements concerning the absence of certain Superman elements in *Action Comics No. 1*
3 were *dicta*.

4 The parties submitted their initial briefs on the Additional Issues on July 21, 2008
5 and their responsive briefs on July 28, 2008. The Court heard oral argument on September
6 16, 2008, during which the Court bifurcated the trial, with separate trials on (1) the alter
7 ego issues identified in the Court’s March 26, 2008 Partial Summary Judgment Order, to
8 determine which Defendants were required to account to Plaintiffs for their Superman
9 profits; and (2) the ultimate accounting claim.

10 On October 6, 2008, the Court issued an Order denying Plaintiffs’ request for a jury
11 trial on their “alter ego” and accounting claims. *Siegel v. Warner Bros. Entm’t Inc.*, 581 F.
12 Supp. 2d 1067 (C.D. Cal. 2008).⁴ The Court “reserve[d] decision on the other Additional
13 Issues] until shortly before the time of [the accounting] trial.” *Id.* at 1076.

14 **C. Plaintiffs’ Lanham (Trademark) Act and Waste Claims**

15 Trial on Plaintiffs’ Lanham Act and waste claims was set for November 4, 2008.
16 On September 25, 2008, the parties submitted a stipulation seeking leave for Plaintiffs to
17 file their Second Amended Complaint, removing Plaintiffs’ Lanham Act and waste claims.
18 On October 6, 2008, the Court held a status conference to address the parties’ stipulation
19 and other trial scheduling issues. The Court then accepted the parties’ stipulation, granting
20 Plaintiffs leave to file the Second Amended Complaint, which they did on October 8,
21 2008. Defendants filed their Answer to Plaintiffs’ Second Amended Complaint on
22 October 20, 2008.

23 In the Court’s October 6, 2008 Order on the jury issues, the Court bifurcated the
24 trial, with separate trials on: (1) the alter ego issues identified in the Court’s March 26,

25 ⁴ Plaintiffs had alternatively requested an advisory jury to the extent the Court engaged in an
26 “apportionment” analysis. Plaintiffs contend that the Court did not decide Plaintiffs’ request
27 that it empanel an “advisory jury.” Defendants contend that the Court rejected any claim for a
28 jury in connection with the accounting trial and did not leave the question of an advisory jury
for later decision.

1 2008 partial summary judgment Order, which would determine which Defendants'
2 Superman profits would be subject to an accounting, and (2) the ultimate accounting
3 claims. The Court scheduled the alter ego trial for January 20, 2009 and the accounting
4 trial for March 16, 2009.

5 **D. The "Alter-Ego Trial"**

6 In its March 26, 2008 Partial Summary Judgment Order, the Court found, with
7 respect to the close relationship between DC and Warner Bros., that "[t]his fact alone
8 raises a specter of a 'sweetheart deal' entered into by related entities in order to pay a less
9 than market value fee for licensing valuable copyrights." *Siegel II*, 542 F.Supp.2d at 1144.
10 Accordingly, the Court conducted the "alter-ego trial" from April 28, 2009 to May 13,
11 2009, and heard closing arguments on May 19, 2009. In its March 13, 2009 Final Pre-
12 Trial Conference Order, the Court stated:

13 Given the nature and the characterization of the property in question, the trial shall
14 determine whether the value of the various Superman option and assignment
15 agreements between DC Comics and TWEC [Time Warner Entertainment
16 Company, LP], Warner Bros. Entertainment's predecessor in interest, and the
17 amounts paid to DC Comics by TWEC (and its successor Warner Bros.
Entertainment) thereunder, reflect the fair market value of the nonexclusive rights
that the Court has determined were transferred from DC Comics to TWEC (and its
successor Warner Bros. Entertainment), and, if not, what accounting shall be
required of Warner Bros. Entertainment to ensure an equitable result.

18 Final Pretrial Conference Order at 7-8.

19 After the parties finished their closing arguments on May 19, 2009, the Court
20 dismissed Time-Warner from the case pursuant to Rule 52(c) (Tr. at 1598:2 – 1598:3) and
21 held that there was insufficient evidence to establish that the consumer products agreement
22 or animation agreements at issue were not fair market agreements. (Tr. at 1598:4 –
23 1598:8).

24 The Court took the other issues under submission. On July 8, 2009, the Court issued
25 its findings of fact and conclusions of law concerning the "alter-ego trial." The court
26 found in favor of Defendants as of the time of trial with respect to each of the agreements
27 at issue, concluding that:

- 28 • "there is insufficient evidence that the Superman film agreement between DC

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1 Comics and Warner Bros., whether judged by its direct economic terms or its
2 indirect ones, was consummated at below its fair market value.” Order at 28; and
3 • “the Court finds that there is no evidence introduced at trial that demonstrates that
4 the Smallville agreement was for less than fair market terms.” *Id.*

5
6 However, the Court held that because the Defendants’ Superman film agreement did
7 not contain a customary “reversion” clause in DC’s favor, Plaintiffs could seek damages if
8 filming on a Superman sequel has not commenced by 2011:

9 • “If, however, by 2011, no filming has commenced on a Superman sequel, plaintiffs
10 could bring an accounting action at that time to recoup the damages then realized for
11 the Superman film agreement’s failure to contain a reversion clause.” *Id.* at 29.

12
13 **E. The August 12, 2009 Decision on “Work-For-Hire” Issues.**

14 On August 12, 2009, the Court issued an “Order Resolving Additional Issues.” In
15 its Order, the Court ruled on the work-for-hire arguments presented in the parties’
16 Additional Issues briefing, and denying Plaintiffs’ request for a jury trial on the work-for-
17 hire issue. At issue was whether the following works were “works-made-for-hire”: (i) a
18 description of “future Superman exploits” written by Siegel; Superman comic strips
19 created by Siegel and artist Russell Keaton (the “Keaton Material”); *Action Comics Nos. 2-*
20 *61*; *Superman Nos. 1-6*; and Superman newspaper strips syndicated by the McClure
21 Newspaper Syndicate. In pertinent part, the Court ruled as follows:

- 22 • The “future Superman exploits” paragraph written before the publication of *Action*
23 *Comics No. 1* could not be terminated because it was too generalized to achieve
24 copyright protection. *Siegel v. Warner Bros. Entertainment, Inc.*, 2009 U.S. Dist.
25 LEXIS 78193 at *58-*61 (C.D. Cal. Aug. 9, 2009) (“Siegel III”);
- 26 • The “Keaton Material” was unpublished and therefore could not be terminated,
27 because it did not “acquire[] statutory copyright protection under the 1909 Act, as it
28 was either never published with the requisite notice or registered as an unpublished

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1 work.” *Id.* at *61;

2 • The Superman material “appearing in Action Comics No. 4 is based almost
3 verbatim on Siegel’s pre-1938 script, . . . the Superman material appearing therein
4 was not a work for hire and is subject to termination” and recaptured by Plaintiffs.
5 *Id.* at *66-*67;

6 • Superman No. 1, pages three through six, was not a work made for hire and was
7 thus subject to termination and recaptured by Plaintiffs. *Id.* at *69-*70;

8 • “[T]he Superman material in Action Comics Nos. 2-3 and 5-6 . . . were works made
9 for hire.” *Id.* at *78-*79;

10 • “[T]he Superman materials created by Siegel and Shuster during the term of their
11 employment agreement (namely, Action Comics Nos. 7-61, and to Superman Nos.
12 1-23) were works made for hire.” *Id.* at *86-*87;

13 • “[T]he two weeks’ worth of newspaper comic strip material created by Siegel and
14 Shuster during the spring of 1938, before the execution of the syndication agreement
15 were not works made for hire” and therefore were subject to termination and
16 recaptured by Plaintiffs. *Id.* at *129;

17 • The failure to list the two weeks of newspaper strips in the termination notices “was
18 ‘harmless error’ that does not affect the validity of termination notice” regarding
19 these newspaper strips; and

20 • “[T]he newspaper strips created by Siegel and Shuster after September 22, 1938,
21 were works made for hire, [and] the right to terminate does not reach the grant to
22 those works.” *Id.* at *119.

23 As a result of these various rulings, Plaintiffs have recaptured Jerome Siegel’s co-
24 authorship interests in, and co-own with Defendant DC, the copyrights to the following
25 works: the first Superman story as published in *Action Comics No. 1*, *Action Comics No.*
26 *4*, *Superman No. 1* (pages three through six), and the first two weeks of the Superman
27 newspaper strips. The Court declined to address the remaining Additional Issues that have
28 been pending before the Court since the parties briefed them in July of 2008, reserving

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1 decision on those issues to a later date in advance of the accounting trial. *Id.* at *165, n.
2 27. Defendants filed a motion on October 2, 2009, seeking reconsideration of the
3 Court's ruling that the omission of the first two weeks of the Superman newspaper strips
4 from the Termination Notices was "harmless error." Plaintiffs filed a motion on October
5 3, 2009, requesting reconsideration of the Court's ruling that the McClure newspaper strips
6 created by Siegel and Shuster after September 22, 1938 were works made for hire. In an
7 opinion dated October 30, 2009, the Court denied both parties' motions.

8 **F. Discovery Matters Impacting the Accounting Trial.**

9 The discovery cut-off in these actions was November 16, 2006. After that discovery
10 cutoff, the Court decided several discovery motions, and ordered on August 13, 2007 an
11 audit of Defendants. In addition, the parties entered into a stipulation on June 9, 2008 in
12 which they agreed to supplement production in advance of trial, and Defendants agreed to
13 supplement their financial production at the end of each financial quarter. Defendants last
14 supplemented their financial information on June 1, 2009.

15 On October 1, 2009, the Court adopted a stipulation by the parties which granted
16 Plaintiffs leave to replace their former expert Mark Halloran. The stipulation also granted
17 Defendants leave to appoint a new rebuttal expert and if necessary provide limited
18 supplemental rebuttal reports from previously designated experts.

19 The parties' accounting experts will also need to prepare supplemental reports
20 updating their prior analysis of DC's profits as of June 30, 2007, based on the most recent
21 financial data available.

22 **G. Current Status of the Superman Action.**

23 The Court will need to schedule the trial and corresponding pretrial deadlines for the
24 accounting action. As established in the alter-ego trial, the accounting action will concern
25 Defendant DC's profits from the exploitation of those Superman copyrights that the Court
26 has held were recaptured by Plaintiffs' Terminations and are co-owned by DC and
27 Plaintiffs (namely, the first Superman story published in *Action Comics No. 1*, *Action*
28 *Comics No. 4*, *Superman No. 1* (pages three through six), and the first two weeks of the

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1 Superman newspaper strips).

2 Both parties respectfully request, however, that the Court determine the remaining
3 undecided Additional Issues which the parties briefed in 2008. Because such Additional
4 Issues define the contours of the pending accounting trial, the parties cannot properly
5 prepare for trial prior to a determination of the Additional Issues. The Additional Issues
6 are not *in limine* motions and have far too large an impact on the trial to be decided like *in*
7 *limine* motions, only days before trial. These remaining Additional Issues include:

- 8 • The impact, if any, that Defendants' pre-*Action Comics No. 1* "promotional
9 announcements" have on the scope of Plaintiffs' recaptured copyrights;
- 10 • Whether principles of apportionment should be applied to the calculation of
11 Plaintiffs' share of the profits from the recaptured copyrights;
- 12 • Whether the apportionment analysis, if applicable, should be on a work-by-work
13 basis or pursuant to a general "template," or whether there should be an alternative
14 method of apportionment;
- 15 • Who bears the burden of proof on what issues;
- 16 • How broad or narrow is the scope of the mixed use – copyright/trademark –
17 products and merchandise as to which an accounting is required (*e.g.*, t-shirts with
18 both Superman trademarks and copyrightable imagery);
- 19 • How much or how little is needed to transform the post-termination sale of a pre-
20 termination "derivative work" into a post-termination "derivative work" so as to
21 require an accounting (*e.g.*, DVD boxed sets of pre-1999 Superman films); and
- 22 • Whether the Court's background statements in its March 26, 2008 Partial Summary
23 Judgment Order concerning the literary elements in *Action Comics No. 1* are *dicta*.

24

25 The Court's decision on these remaining Additional Issues will materially impact
26 the parties' pretrial preparations and the accounting trial itself. Without guidance from the
27 Court on these Additional Issues, well in advance of the deadlines set by the Court for the
28 parties' pretrial submissions, the parties' pretrial submissions will likely be unnecessarily

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1 duplicative and not conform to the standards the Court ultimately adopts to govern the
2 trial.

3 **II. The Superboy Action (Case No. CV 04-8776).**

4 On November 2, 2002, Plaintiffs served a separate notice of termination under 17
5 U.S.C. § 304(c), as of November 17, 2004, regarding Siegel's copyright grants of the
6 Superboy character to DC's predecessors.

7 Plaintiffs filed their initial Complaint in the Superboy Action on October 22, 2004.
8 The Complaint contained the following causes of action:

- 9 • Plaintiffs' First Cause of Action sought declaratory relief confirming the validity of
10 Plaintiffs' Superboy Termination Notice pursuant to 17 U.S.C. § 304(c). Unlike the
11 Superman Action, where Plaintiffs acknowledged that Siegel co-authored Superman
12 and that Plaintiffs therefore co-own recaptured Superman copyrights, Plaintiffs
13 alleged that Siegel solely authored the first Superboy story and that therefore
14 Plaintiffs solely own recaptured Superboy copyrights.
- 15 • Plaintiffs' Second Cause of Action alleged that Defendants violated the Lanham Act
16 by falsely representing that they are the exclusive owners of Superboy.
- 17 • Plaintiffs' Third Cause of Action alleged that Defendants violated California
18 Business and Professions Code §§ 17200 *et seq.* by omitting mention of the
19 Superboy Termination from Time-Warner's public financial disclosures.
- 20 • Plaintiffs' Fourth Cause of Action sought injunctive relief preventing Defendants
21 from exploiting derivative post-termination Superboy works.

22 Defendants filed their initial Answer and Counterclaims on November 22, 2004.

23 The Counterclaims asserted therein mirrored those included in Defendants' Counterclaims
24 filed in the Superman case. *See* Section I, *supra*.

25 Plaintiffs filed their First Supplemental Complaint on April 19, 2005. The principal
26 change from their initial Complaint was the inclusion of a First Cause of Action for
27 Defendants' alleged copyright infringement after November 17, 2004, the effective date of
28 the Superboy Termination. Plaintiffs alleged that any Superboy works (*e.g.*, the *Smallville*

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1 television series) released by Defendants after the effective Termination date would
2 infringe Plaintiffs' recaptured original Superboy copyright. Defendants filed their Answer
3 to Plaintiffs' First Supplemental Complaint on September 7, 2005.

4 On October 18, 2005, the Court adopted the parties' stipulation permitting Plaintiffs
5 to file their First Amended Supplemental Complaint, and Defendants to file their First
6 Amended Counterclaims. Defendants filed their Answer to the First Amended
7 Supplemental Complaint on November 1, 2005, and Plaintiffs filed their Reply to
8 Defendants' First Amended Counterclaims on November 4, 2005.

9 **A. February 15, 2006 Cross-Motions for Summary Judgment.**

10 On February 15, 2006, the parties filed cross-motions for summary judgment.
11 Plaintiffs moved for partial summary judgment, requesting a ruling that their statutory
12 Termination was valid and effective under 17 U.S.C. §304(c), arguing:

- 13 • That Jerry Siegel alone created Superboy as embodied in a November 30, 1938
14 "pitch" letter from Mr. Siegel to DC's predecessor, Detective, and a thirteen-page
15 typed "Superboy" script Mr. Siegel submitted to Detective in December, 1940 (the
16 "Siegel Superboy Materials").
- 17 • That the judicial findings in a prior 1947 action between the parties' predecessors in
18 the Supreme Court of the State of New York are binding on Defendants under the
19 doctrines of *res judicata* and collateral estoppel.
- 20 • That the 1947 action held that "Siegel is the originator and sole owner of the comic
21 strip feature Superboy."
- 22 • That the preclusive effect of the findings and conclusions in the 1947 action was
23 explicitly confirmed by the Second Circuit Court of Appeals in *Jerome Siegel, et al.*
24 *v. National Periodical Publications, et al.*, 509 F.2d 909, 912-913 (2nd Cir. 1974).
- 25 • That Plaintiffs' Superboy Notices of Termination complied with the requirements
26 set forth in 17 U.S.C. § 304(c).
- 27 • That Plaintiffs' Superboy Notices of Termination were not required to list the 1948
28 Consent Judgment from the 1947 action, as the Consent Judgment was not a grant

1 and as Plaintiffs listed the duplicative 1948 Stipulation between the parties; and

2 • That the Superboy materials created by Siegel were not “works-for-hire.”

3
4 Defendants cross-moved for summary judgment, arguing:

5 • That because Superboy is derivative of Superman, Plaintiffs should not be permitted
6 to proceed in a separate Superboy action;

7 • That because the Siegel Superboy Materials were never published or registered as an
8 unpublished work, there was no “copyright subsisting in either its first or renewal
9 term on January 1, 1978,” and the “Superboy works” were therefore not eligible for
10 termination under 17 U.S.C. § 304(c);

11 • That the Siegel Superboy Materials were not eligible for termination because they
12 were “works for hire;”

13 • That the Siegel Superboy Materials were joint works of Siegel and Shuster, so that if
14 otherwise terminable, Plaintiffs could only recapture a one-half share to the
15 copyrights in such works;

16 • That Plaintiffs failed to terminate the grant in the May 21, 1948 Final Consent
17 Agreement; and

18 • Plaintiffs’ claim that the *Smallville* television series infringes the copyright in the
19 Siegel Superboy Materials should be dismissed because Plaintiffs cannot meet the
20 test for establishing infringement.

21
22 Judge Lew, who presided over the Superboy Action at that time, issued a decision
23 on the parties’ cross-motions on March 24, 2006, granting Plaintiffs’ motion for partial
24 summary judgment and denying Defendants’ motion for summary judgment.

25 One of the principal disputes briefed by the parties and addressed in Judge Lew’s
26 ruling was whether the 1948 findings of fact and conclusions of law issued in support of an
27 interlocutory ruling in the 1947 state court action had preclusive effect in the Superboy
28 litigation. Judge Lew concluded that the 1948 findings of fact and conclusions of law have

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1 preclusive effect:

2 “Having relied on [the 1947 action’s] findings for previous favorable determinations
3 regarding Superman, Defendants now take the inconsistent position that this Court is
4 not bound by the state court findings, as they relate to Superboy... Contrary to
5 Defendants’ assertions now, both the Southern District of New York and Second
Circuit looked directly to, even citing to, Judge Young’s findings of fact. This Court
holds that it is consistent to continue this position and will look to Judge Young’s as
binding where relevant.”

6 See March 24, 2006 Order at 7:4-7; 7:14-19.

7 Judge Lew also held that “no genuine issue of material fact exists regarding the
8 effectiveness of [Plaintiffs’] termination of the Superboy copyrights.” *Id.* at 12:8-11.

9 Judge Lew also denied Defendants’ motion that Defendants’ *Smallville* television series
10 does not infringe Plaintiffs’ recaptured copyrights in the Siegel Superboy Material,
11 preserving this issue for trial. *Id.* at 15:8-16:26.

12 Defendants filed a certification motion pursuant to 28 U.S.C. § 1292(b) on April 17,
13 2006, requesting that Judge Lew certify the matter for appeal. Judge Lew denied the
14 certification request in an order dated May 22, 2006.

15 Judge Lew thereafter took senior status and these actions were reassigned to Judge
16 Larson on October 26, 2006. On January 12, 2007, Defendants filed a motion for
17 reconsideration, requesting that Judge Larson reconsider Judge Lew’s holding that “Judge
18 Young’s findings of fact [in the 1948 Westchester Action between the parties’
19 predecessors] have preclusive res judicata and collateral estoppel effect on this Court.”
20 Defendants requested in the alternative that Judge Larson reconsider Judge Lew’s denial of
21 Defendants’ April 17, 2006 certification motion.

22 Judge Larson granted Defendants’ reconsideration motion in an order dated July 27,
23 2007. In that ruling, Judge Larson concluded that the referee’s findings in the Westchester
24 Action should have preclusive effect, but as a matter of collateral estoppel, not judicial
25 estoppel. However, Judge Larson ruled that “contrary to the March 24, 2006 Order, those
26 findings are not necessarily determinative of all the issues.” *Siegel v. Time Warner Inc.*,
27 496 F. Supp. 2d 1111, 1131 (C.D. Cal. 2007) (“*Siegel I*”). Judge Larson summarized his
28 rulings as follows:

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Based on the referee's findings, the Court has determined that Siegel's Superboy submissions were not a work made for hire, but the Court is unable to conclude whether the requisite 'publication' of the Superboy submissions occurred due to the unresolved matter regarding the submissions' derivative nature. Similarly, the Court was unable to conclude whether the Superboy submissions were part of a joint work, but only because the issue of whether the submissions are a derivative work remains unresolved (and a subject of further court-ordered briefing).

Id. at 1155.

Judge Larson therefore requested supplemental briefing by the parties on the issue of "the derivative nature, if any, of Siegel's Superboy submissions, bearing in mind the legal principles set forth in *Nichols* [*v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930)] as expounded in [*Detective Comics, Inc. v. Bruns Publications, Inc.*, 111 F.2d 432 (2d Cir. 1940)], *Warner Bros. [v. Am. Broad. Cos.]*, 720 F.2d 231 (2d Cir. 1983)], and *Sapon [v. DC Comics]*, 62 U.S.P.Q.2d 1691 (S.D.N.Y. 2002)]." *Id.* The parties submitted their supplemental briefing on September 10, 2007, but Judge Larson did not issue a ruling on the matter.

B. The Parties' April 30, 2007 Partial Summary Judgment Motions

Between the time Defendants moved for reconsideration of Judge Lew's March 24, 2006 Order and the time Judge Larson issued his July 27, 2007 decision granting reconsideration, the parties filed partial summary judgment motions in both cases on April 30, 2007. Defendants sought partial summary judgment in the Superboy Action (some of which overlaps with their motions in the Superman Action) on the follow grounds:

- That Plaintiffs have no right under the Copyright Act to share in Defendants' profits derived (a) from the foreign exploitation of any Superboy work, including "Superboy" or any other juvenile version of Superman, (b) from the exploitation of the Superman family of trademarks, or (c) from the continued exploitation of any Superman "derivative work," including "Superboy," or any other juvenile version of Superman, created prior to the effective dates of Plaintiffs' Terminations;
- That as a result of Plaintiffs' alleged failure to terminate certain copyrighted works as prescribed by the Copyright Act, Defendants remain free to use such unterminated works and the elements contained therein without accounting to

1 Plaintiffs and without liability for copyright infringement; and

2 • That the episodes of the television series *Smallville* prepared on or after November
3 17, 2004 are not “substantially similar” to, and therefore do not infringe upon, any
4 of the Superboy copyrights recaptured by Plaintiffs pursuant to their Termination
5 Notices.

6 Plaintiffs cross-moved for partial summary judgment on the following grounds:

7 • That Plaintiffs are entitled to an accounting of all profits earned from Plaintiffs’
8 recaptured Superboy copyrights, both in the United States and in foreign territories,
9 to the extent that such foreign profits flow from Defendants’ exploitation of such
10 copyrights within the United States.

11
12 As discussed in detail in Section I(A) above, the Court issued its ruling on the
13 parties’ Superman partial summary judgment motions on March 26, 2008. In addition, the
14 Court issued a separate order related to the Superboy Action on March 31, 2008, in which
15 the Court denied the parties’ motions for partial summary judgment in the Superboy
16 Action as moot:

17 As the Court stated during the September 17, 2007 hearing on the parties’ cross
18 motions for partial summary judgment in these cases, the issues raised by the parties
19 in the Superboy action . . . , in light of the Court’s earlier ruling on July 27, 2007,
and with a forthcoming ruling in the companion Superman action . . . , would be
rendered moot.

20 Order at 1.

21 The Court further stated:

22 “[T]he Court reserves issuing an order on the remaining issues brought up in the
23 Court’s July 27, 2007 Order in the Superboy case (and to which the parties have
24 provided both supplemental briefing and oral argument), and setting the pre-trial and
trial-dates in the Superboy matter, if needed, until after the conclusion of the trial in
the Superman case.”

25 Order at 2.

26 **C. Current Status of the Superboy Action.**

27 Plaintiffs’ position is that the Court never issued a final ruling that the Siegel
28 Superboy Materials were a “joint work.” Defendants’ position is that the Court ruled that

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1 the Siegel Superboy Materials were a “joint work” if and to the extent that they were
2 copyrightable at all. In addition, given the Court’s July 27, 2007 ruling along with its
3 March 31, 2008 ruling, the parties agree that the Court still needs to make determinations
4 on: (1) the extent of the original copyrightable material in Siegel’s Superboy Materials, if
5 any; and (2) whether the original material, if any, from the Superboy Materials was
6 published in a work allegedly subject to recapture pursuant to the Superboy Termination
7 Notices.

8 Although Judge Larson suggested in his March 31, 2008 Order that he would wait to
9 resolve these issues until after the conclusion of the accounting trial in the Superman
10 action, the parties submit that they should properly be decided in advance of the Superman
11 accounting trial so that the parties can also account in the Superman Action for Siegel’s
12 Superboy Materials, if such is held to be appropriate.

13 **III. The Parties’ Mediation Efforts.**

14 The parties have engaged in two settlement mediations before the Hon. Daniel
15 Weinstein (Ret.), the first in May-June 2008, and the second in September 2009. On
16 November 11, 2009, the parties each submitted a status report to the mediator pursuant to
17 the mediator’s directive. Despite the parties’ mediation efforts, to date they have not
18 settled these cases.

1 Respectfully submitted,

2

3 DATED: December 21, 2009

WEISSMANN WOLFF BERGMAN
COLEMAN GRODIN & EVALL LLP

4

-and-

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FROSS ZELNICK LEHRMAN & ZISSU, P.C.

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-and-

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PERKINS LAW OFFICE, P.C.

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10

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By: 

Michael Bergman

12

Attorneys for Defendants and counterclaimant

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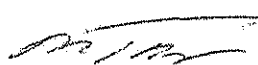
DATED: December 21, 2009

TOBEROFF & ASSOCIATES, P.C.

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By: 

Marc Toberoff

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Attorneys for Plaintiffs/Counterclaim-Defendants

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EXHIBIT T

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

JOANNE SIEGEL, an individual; and
LAURA SIEGEL LARSON, an
individual,

Plaintiffs,

vs.

WARNER BROS. ENTERTAINMENT
INC., a corporation; TIME WARNER
INC., a corporation; DC COMICS, a
general partnership; and DOES 1-10,

Defendants.

DC COMICS,

Counterclaimant,

vs.

JOANNE SIEGEL, an individual; and
LAURA SIEGEL LARSON, an
individual,

Counterclaim Defendants.

Case No: CV 04-8400 ODW (RZx)

Hon. Otis D. Wright II, U.S.D.J.

**PLAINTIFFS' NOTICE OF
MOTION AND MOTION FOR
ENTRY OF A PARTIAL
JUDGMENT UNDER FED. R.
CIV. P. 54(B) AND FOR STAY
OF REMAINING CLAIMS
PENDING APPEAL;
MEMORANDUM OF POINTS
AND AUTHORITIES**

Complaint filed: October 8, 2004
Trial Date: None Set

Date: September 27, 2010
Time: 1:30 p.m.
Place: Courtroom 11

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on September 27, 2010 at 1:30 p.m., or as soon
3 thereafter as counsel may be heard, in Courtroom 11 of the above-captioned Court,
4 located at 312 N. Spring Street, Los Angeles, California, 90012, plaintiffs Joanne
5 Siegel and Laura Siegel Larson will and hereby do respectfully move the Court for
6 certification pursuant to Fed. R. Civ. P. 54(b) of the Court's March 26, 2008 and
7 August 12, 2009 orders, which granted partial summary judgment upholding the
8 validity and scope of plaintiffs Joanne Siegel and Laura Siegel Larson's ("Plaintiffs")
9 notices of copyright termination filed pursuant to 17 U.S.C. § 304(c) regarding the
10 world famous character Superman. These orders also determined which Superman
11 works (i.e., certain Superman comic books and newspaper strips) have been
12 recaptured pursuant to the Plaintiffs' notices of termination. The Court's orders
13 constitute a "final" disposition of Plaintiffs' claim that the notices of termination are
14 valid, and there is no just reason to delay entering the orders as an immediately
15 appealable judgment with respect to such claim. Indeed, due to the distinct nature of
16 the claims that are the subjects of the Court's orders, the ability to immediately
17 appeal such orders will increase judicial efficiency and decrease prejudice and
18 hardship for the parties, as these issues have a direct bearing on the remaining
19 accounting claims in this case. Any errors in these decisions, particularly with
20 respect to those Superman works recaptured by Plaintiffs' terminations, will mean
21 the accounting action will have been substantively incomplete, and thus need to be
22 substantially re-tried. Accordingly, the interests of efficiency and fairness support a
23 stay of the remaining claims in this matter pending disposition of Plaintiffs' appeal.

24 This motion is made following the conference of counsel pursuant to L.R. 7-3
25 which took place in person on July 13, 2010. The parties further met and conferred
26 telephonically on August 5, 2010. Defendants informed Plaintiffs that they would
27 oppose this motion.

28 Plaintiffs' motion is based on this Notice of Motion and Motion, the attached

1 Memorandum of Points and Authorities, the pleadings and records on file in this
2 action, such additional authority and argument as may be presented in any reply and
3 at the hearing on this motion, and such other matters of which this Court may take
4 judicial notice.

5 DATED: August 12, 2010

TOBEROFF & ASSOCIATES, P.C.

6
7 By



Marc Toberoff

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9 Attorneys for Plaintiffs Joanne Siegel and
Laura Siegel Larson
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INTRODUCTION

A final judgment has been reached and should be recognized in this action as to the validity and scope of the copyright termination notices under 17 U.S.C. § 304(c) (the “Siegel Terminations”) served by Plaintiffs Joanne Siegel and Laura Siegel Larson (the “Siegels”) regarding the iconic character Superman. In a series of lengthy published decisions, this Court completely resolved all of the issues in Plaintiffs’ First Claim for Relief, and most of the related issues in Defendant/Counterclaim-Plaintiff DC Comics’ First, Second, Third, Fourth and Fifth Counterclaims, which relate to the validity and scope of the Siegel Terminations. *See Siegel v. Warner Bros. Ent. Inc.*, 542 F. Supp. 2d 1098 (C.D. Cal. 2008) (“*Siegel I*”), 658 F. Supp. 2d 1036 (C.D. Cal. 2009) (“*Siegel II*”).

Specifically, this Court has found that the Siegel Terminations are valid and that, as of April 16, 1999, the Plaintiffs are co-owners with Defendants of the original Superman copyright. *Siegel I*, 542 F. Supp. 2d at 1130, 1145. The Court has also delineated the Superman works subject to the Siegel Terminations: the first Superman story as published in *Action Comics, No. 1*, and the Superman stories published in *Action Comics, No. 4, Superman, No. 1* (pages 3-6), and the first two weeks of the Superman newspaper strips. *Siegel II*, 658 F. Supp. 2d at 1063-83.

The trier of fact must now decide Plaintiffs’ remaining accounting claims as to the profits owed Plaintiffs since April 16, 1999 (the effective date of the Siegel Terminations) from Defendants’ exploitation of the core Superman copyrights co-owned with Plaintiffs. *See* Docket No. 602 (“Joint Status Report”), at 16:8-23. The accounting claims and pending accounting trial are directly premised on the correctness of this Court’s prior rulings as to the Superman works recaptured by Plaintiffs. If any recaptured Superman works are improperly excluded or included in the trier of fact’s analysis, then the entire accounting trial will have to be re-tried. Therefore, in the interests of judicial economy, and to avoid duplicative and pointless re-litigation of the accounting phase of this case, this Court should enter a final

1 judgment as to Plaintiffs' severable First Claim for Relief, enabling the parties to
2 immediately appeal such judgment to the Ninth Circuit. The certainty and guidance
3 provided by Ninth Circuit review at this juncture will also promote long-awaited
4 settlement of the Superman matter.

5 DC attempts in its recently filed complaint, *DC Comics v. Pacific Pictures*
6 *Corp., et al.*, Case No. 10-CV-03633 ODW (RZx), to re-litigate the Court's rulings
7 against it on the First Claim in *Siegel* after six years of hard-fought litigation. DC's
8 new action challenges the validity and scope of the Superman termination notice filed
9 by the executor ("Shuster Executor") of the estate of Joseph Shuster, the co-author
10 with Jerome Siegel of the exact same Superman works litigated in the *Siegel* action.
11 The Shuster termination is the mirror-image of the Siegels' notices of termination,
12 upheld in *Siegel*. In fact, in its new action, DC raises "work for hire" and other
13 defenses identical to those raised in *Siegel*. DC even argues that its purported
14 settlement agreement defense, fully adjudicated and rejected by the Court in *Siegel*,
15 should be re-litigated even though the Shusters had no involvement in the Siegels'
16 settlement negotiations. See *DC Comics*, Docket No. 1, ¶¶ 112-15, 140-41, 145-46,
17 168 n.6. DC is effectively "appealing" *Siegel* in the same district court under the
18 thinly veiled guise of a "new" action. However, the proper and most efficient forum
19 for the appeal DC craves is the Ninth Circuit. Final resolution of the issues in *this*
20 case by the Ninth Circuit will avoid unnecessary, duplicative and wasteful litigation
21 of identical issues in the *DC Comics* action.

22 Lastly, because the Ninth Circuit's decision regarding Plaintiffs' First Claim
23 will control the outcome in the pending "accounting" trial, this Court should exercise
24 its discretion to stay this action until such appeal is complete.

25 **FACTUAL BACKGROUND**

26 Plaintiffs Joanne Siegel and Laura Siegel Larson are the widow and daughter,
27 respectively, of Jerome Siegel ("Siegel") who, with Joseph Shuster ("Shuster"), co-
28 created Superman. Siegel and Shuster co-authored the first Superman comic book

1 story which was later published in 1938 in *Action Comics, No. 1*, by Detective
2 Comics, Inc. (“Detective”), the predecessor of Defendant DC Comics (“DC”). *Siegel*
3 *I*, 542 F. Supp. 2d at 1105-07, 1126-30. By agreement dated March 1, 1938, Siegel
4 and Shuster granted to Detective all worldwide rights in their Superman story and
5 character, and Detective exploited those rights in various media over the next seventy
6 years. *Id.* at 1107, 1110. From 1938 to 1943, Siegel and Shuster wrote hundreds of
7 additional Superman comic book stories published by Detective, and hundreds of
8 Superman newspaper strips syndicated by the McClure Newspaper Syndicate. *Siegel*
9 *II*, 658 F. Supp. 2d at 1047-56.

10 The 1976 Copyright Act, which became effective on January 1, 1978, provided
11 authors and their families with valuable new rights to recapture the author’s original
12 copyright(s), for the extended renewal term, by noticing the termination of previous
13 grants of copyright. *See* 17 U.S.C. §§ 304(c), 304(d). Pursuant to § 304(c) of the
14 1976 Act, the Siegels served notices of termination on DC with respect to Siegel’s
15 original copyright interests in Superman and Superboy on April 3, 1997, and
16 November 8, 2002, respectively, with effective termination dates of April 16, 1999,
17 and November 17, 2004, respectively. *Siegel I*, 542 F. Supp. 2d at 1114.

18 Superman is considered a joint work under the Copyright Act because it was
19 co-authored by Siegel and Shuster. As such, each co-author originally owned an
20 undivided 50% interest in the copyright therein. Joint owners of a copyright each
21 have the non-exclusive right to exploit such copyright, subject to a duty to account to
22 one another. The Siegel Terminations related to Siegel’s (not Shuster’s) 50% interest
23 in the original Superman copyrights. Shuster was not married at the time of his death
24 and had no children, and accordingly his estate lacked termination rights until 1998.¹

25
26 ¹ At the time of Joseph Shuster’s death, under the Copyright Act of 1976, Pub. L. 94-553,
27 17 U.S.C. § 304(c)(2), only an author’s widow or widower, children or grandchildren held
28 termination rights, and as Shuster had none, no one held termination rights as to Shuster’s
50% copyright interest in Superman. *Siegel I*, 542 F. Supp. 2d at 1114 n.3. The Copyright
Term Extension Act of 1998, Pub. L. 105-298, expanded the category of potential holders
of the termination right by adding “the author’s executor, administrator, personal
representative, or trustee” to the list of potential holders of termination rights. 17 U.S.C. §
304(c)(2)(D); *Siegel I*, 542 F. Supp. 2d at 1114 n.3. The estate of Joseph Shuster was

Warner Bros. Entertainment, Inc. (“Warner”) and its subsidiary, DC, challenged the validity and scope of the Siegel Terminations. In response, the Siegels in October 2004 filed the Superman and Superboy actions, which included a claim for declaratory relief that the Siegel Terminations were valid, and additional claims. *See Siegel v. Warner Bros. Ent. Inc.*, C.D. Cal. Case No. 04-08400 ODW (RZx) (“*Siegel*” or the “Superman Action”), Docket Nos. 1, 378, Second Amended Complaint (“SAC”), ¶¶ 52-55, 83 (“First Claim”); *Siegel v. Time Warner Inc.*, C.D. Cal. Case No. 04-08776 ODW (RZx) (the “Superboy Action”). DC counterclaimed that the Siegel Terminations were invalid or tried to limit their scope. *See Siegel*, Docket No. 42, First Amended Counterclaim (“Counterclaims”), ¶¶ 68-69, 70-76, 90-96, 97-101, 102-113, 118-20, 132-35.

The SAC in the Superman action contained the following causes of action:

- Plaintiffs’ First Claim for Relief sought declaratory relief to affirm the validity of Plaintiffs’ Superman Termination Notices pursuant to 17 U.S.C. § 304(c);
- Plaintiffs’ Second Claim for Relief sought declaratory relief as to the scope of Defendants’ duty to account to Plaintiffs for post-April 16, 1999 profits from exploitation of Plaintiffs’ recaptured Superman copyrights;
- Plaintiffs’ Third Claim for Relief sought a declaration that Defendants have a duty to account for exploitation of the Superman “crest” and/or Superman “shield” on the ground that they are derivative of the copyrighted Superman crest in *Action Comics, No. 1*;
- Plaintiffs’ Fourth Claim for Relief sought an accounting from all Defendants

probated to avail itself of the termination right provided by the Copyright Term Extension Act of 1998. 17 U.S.C. § 304(d). On November 10, 2003, Warren Peary, the duly appointed personal representative of the estate (the “Shuster Executor”) served a notice of termination under § 304(d) with respect to Shuster’s 50% share of the Superman copyright, with an effective termination date of October 26, 2013, and thereafter filed the notice with the U.S. Copyright Office. *Siegel I*, 542 F. Supp. 2d at 1114 n.3. *See DC Comics*, Complaint, ¶¶ 79-80. On May 14, 2010, DC filed the related case of *DC Comics v. Pacific Pictures Corp., et al.*, Case No. 10-CV-03633 ODW, which seeks, *inter alia*, declaratory relief that the Shuster Termination is somehow invalid. In the *DC Comics* action, DC also seeks to re-litigate many issues already decided in the *Siegel* action. *See DC Comics*, Complaint filed May 14, 2010, at ¶¶ 94-98, 113-15, 122-49, 168, and 168 n.7.

1 for their respective exploitation of recaptured Superman copyrights after the
2 effective Termination date;

- 3 • Plaintiffs' Fifth Claim for Relief alleged that Defendants violated California
4 Business and Professions Code §§ 17200 *et seq.* by omitting the Terminations
5 from Time Warner's public financial disclosures.

6 The following counterclaims were asserted by DC:

- 7 • DC's First Counterclaim requested declaratory relief that the Siegel
8 Terminations Notices were ineffective;
- 9 • DC's Second Counterclaim requested a declaration that the Siegels' claims
10 were barred by the statute of limitations;
- 11 • DC's Third and Fourth Counterclaims alleged that the parties had entered into
12 a settlement agreement that the Siegels had repudiated;
- 13 • DC's Fifth Counterclaim requested declaratory relief on the basis of various
14 limitations provided in section 304(c) that the Court limit the scope and reach
15 of the Superman and Superboy notices;
- 16 • DC's Sixth Counterclaim sought a determination regarding the application of a
17 number of accounting principles in the event that the Siegel Terminations were
18 deemed valid and effective.

19 Plaintiffs' First Claim, and Defendants' Second, Third and Fourth
20 Counterclaims, as well as certain portions of DC's First and Fifth Counterclaims, all
21 concerned the validity of the Siegel Terminations with respect to numerous
22 Superman works co-authored by Siegel and Shuster. *See* Counterclaims, ¶¶ 68-76,
23 90-113, 118-20, 132-35.

24 The parties conducted substantial discovery over the next two and half years,
25 with fact discovery closing on November 16, 2006. On April 30, 2007, the parties
26 filed cross-motions for partial summary judgment in the Superman Action. Plaintiffs
27 sought partial summary judgment in full as to Plaintiffs' First Claim and as to
28 relevant portions of DC's Counterclaims, as follows:

- 1 • That the Siegel Terminations are valid as a matter of law with respect to at
2 least the original Superman story published in *Action Comics, No. 1*, and that
3 Plaintiffs have thereby recaptured Siegel's co-authorship share of the
4 copyrights therein (*see* SAC, ¶¶ 52-55);
- 5 • That the defenses to the Siegel Terminations alleged in Defendants' First and
6 Second Counterclaims and parts of their Fifth Counterclaim lack merit
7 because: (a) Siegel and Shuster's Superman story published in *Action Comics,*
8 *No. 1*, is not a "work made for hire" as it was independently created by them
9 long before their relationship with Detective (Counterclaim, ¶¶ 132-33); (b)
10 that a May 21, 1948 consent judgment need not have been listed in the Siegel
11 Terminations because it was not a copyright grant and, in any event, is
12 duplicative of a May 19, 1948 stipulation listed in the Siegel Terminations (*id.*,
13 ¶¶ 68-69); (c) that a December 23, 1975 agreement was not a copyright grant
14 and, in any event, Plaintiff Joanne Siegel's acceptance of certain pension
15 benefits thereunder from Defendants did not reinstate any copyright grants (*id.*,
16 ¶¶ 70-76); (d) that the Siegel Terminations were timely served (*id.*, ¶¶ 86-87);
17 and (e) that the Siegel Terminations are not barred by the statute of limitations
18 (*id.*, ¶¶ 90-96);
- 19 • That Defendants' Third and Fourth Counterclaims should be dismissed
20 because the parties failed to consummate a binding settlement agreement
21 regarding Plaintiffs' recaptured copyrights (*id.*, ¶¶ 97-105); and
- 22 • That Plaintiffs are entitled to an accounting of all profits earned from
23 Plaintiffs' recaptured Superman copyrights in the United States and in foreign
24 territories (to the extent such foreign profits are based on Defendants' predicate
25 acts in the United States) (SAC, ¶¶ 58(a), 84(b)).

26 Defendants sought partial summary judgment as follows:

- 27 • That Plaintiffs have no right under the Copyright Act to share in Defendants'
28 profits derived from the foreign exploitation of any Superman work

(Counterclaims, ¶ 137(a));

- That as a result of Plaintiffs’ alleged failure to terminate certain copyrighted works as prescribed by the Copyright Act, Defendants remain free to use such unterminated works and the elements contained therein without accounting to Plaintiffs and without liability for copyright infringement (*id.*, ¶ 137(c)); and
- That neither Warner Bros. nor Time Warner is the “alter ego” of DC, and Plaintiffs therefore are not entitled to reach any Superman-related profits of either of these two Defendants (*id.*, ¶ 137(e); SAC, ¶ 84(g)-(h)).

The Court issued its ruling on the parties’ partial summary judgment motions on March 26, 2008, disposing of the issues listed above. The Court granted Plaintiffs’ motion with respect to Defendants’ work for hire defense, concluding that “all the Superman material contained in *Action Comics*, Vol. 1, is not a work made for hire and therefore is subject to termination.” *Siegel I*, 542 F. Supp. 2d at 1130. The court also granted Plaintiffs’ motion in holding that Plaintiffs’ omission of the 1948 consent judgment in the Siegel termination notices did not diminish or invalidate the terminations. *Id.* at 1132. The Court likewise granted Plaintiffs’ motion that Joanne Siegel’s continued acceptance of benefits under the parties’ 1975 agreement did not constitute a “grant” of copyrights under section 304(c)(6)(D) and had no effect on the Siegel Terminations. *Id.* at 1134. The Court also granted Plaintiffs’ motion in denying Defendants’ statute of limitations defense, holding that Plaintiffs’ action was timely filed. *Id.* at 1136. The Court likewise granted Plaintiffs’ motion in denying Defendants’ purported defense that the parties had allegedly entered into a binding settlement agreement in 2001, ruling that “the parties’ settlement negotiations did not result in an enforceable agreement.” *Id.* at 1139.

The Court granted Defendants’ motion in ruling that certain “promotional announcements” (“Ads”) due to their earlier publication, fell outside the statutory time “window” of the Siegel Terminations. *Id.* at 1126. The Court also severely limited the scope of the Ads holding that they only depict “the image of a person with

1 extraordinary strength who wears a black and white leotard and cape” and contained
2 “[o]bviously nothing concerning the Superman storyline (that is, the literary elements
3 contained in Action Comics, Vol. 1)... thus, Superman’s name, his alter ego, his
4 compatriots, his origins, his mission to serve as a champion of the oppressed, or his
5 heroic abilities in general, do not remain within defendants sole possession to
6 exploit.” *Id.*

7 In addition, the Court granted Defendants’ motion on the foreign profits issue
8 and denied Plaintiffs’ motion, ruling that “the termination notice is *not* effective as to
9 ... defendants’ exploitation of the work abroad,” and that therefore Defendants “must
10 account to plaintiffs only for the profits from such domestic exploitation of the
11 Superman copyright.” *Id.* at 1142.²

12 Both sides moved for clarification and/or reconsideration of certain portions of
13 the Court’s March 26, 2008 Partial Summary Judgment Order. Defendants’ motion
14 (Docket No. 307) requested that the Court reconsider its statement regarding the
15 scope of copyrightable material contained in the “promotional announcements.”
16 Plaintiffs’ motion (Docket Nos. 300, 312) requested that the Court “(a) clarify that
17 Defendants did not secure any copyrightable *Superman* elements via the
18 ‘promotional announcements’”; and (b) clarify that the promotional announcements
19 did not detract from Plaintiffs’ recaptured Superman copyrights. Docket No. 312 at
20 1:13-16. Plaintiffs also sought clarification that the Court’s statements in the
21 background section of its order regarding the Superman elements it did not see in
22 *Action Comics, No. 1* were *dicta*, on the ground that this literary issue had not been
23 joined.

24 On July 3, 2008, the Court issued an order denying Defendants’ motion with
25 prejudice, and “affirm[ed] its conclusion on the scope of the copyrightable material
26 contained in those [promotional] announcements.” Docket No. 327 at 3-4. The

27 ² The Court denied Defendants’ motion to dismiss Plaintiffs’ “alter ego” claims, holding
28 that “whether the license fees paid [to DC for Superman] represents the fair market value
therefor, or whether the license for the works between the entities was a ‘sweetheart deal,’
are questions of fact that are not answered on summary judgment....” *Id.* at 1145.

1 Court denied Plaintiffs' motion, but without prejudice, stating that "[s]hould
2 plaintiffs wish for the Court to deal with the questions identified in their motion, they
3 may append them to those issues identified in the March 31, 2008 Order requiring
4 further briefing." *Id.* at 4.

5 On February 21, 2008, a month before the Court issued its March 26, 2008
6 Partial Summary Judgment Order, the parties filed a stipulation with the Court,
7 requesting that it accept briefing on certain "Additional Issues" that would
8 substantially impact the nature, conduct and length of the trial, as well as the parties'
9 pre-trial preparations. Among these, Defendants sought additional partial summary
10 judgment that Jerome Siegel's contribution to all Superman works published after
11 *Action Comics, No. 1* and within the five-year Termination "window" (1938-1943)
12 were "works made for hire," not subject to termination; Plaintiffs asserted that such
13 fact-intensive "work for hire" issues were for the trier of fact.³

14 **The August 12, 2009 Decision on "Work For Hire" Issues**

15 On August 12, 2009, the Court issued an "Order Resolving Additional Issues."
16 In its Order, the Court ruled on the work for hire arguments presented in the parties'
17 Additional Issues briefing, denying Plaintiffs' request for a trial as to such issues.
18 *See Siegel II*, 658 F. Supp. 2d 1036. At issue was whether the following works
19 within the Termination window were "works made for hire": (i) a description of
20 "future Superman exploits" written by Siegel; (ii) Superman comic strips created by
21 Siegel and artist Russell Keaton (the "Keaton Material"); (iii) *Action Comics, Nos. 2-*
22 *61*; (iv) *Superman, Nos. 1-6*; and (v) Superman newspaper strips syndicated by the
23 McClure Newspaper Syndicate. In pertinent part, the Court ruled as follows:

- 24 • The "future Superman exploits" paragraph written before the publication of
25 *Action Comics, No. 1* could not be terminated because it was too generalized to
26 secure copyright protection. *Id.* at 1061-1062;

27 ³ Pursuant to the Court's July 3, 2008 Order regarding Plaintiffs' motion for clarification,
28 Plaintiffs re-briefed the issues of (a) the scope of Defendants' rights based on the
"promotional announcements," and (b) whether the Court's background statements
concerning the absence of certain Superman elements in *Action Comics No. 1* were *dicta*.

- 1 • The “Keaton Material” was unpublished and therefore could not be terminated,
2 because it did not “acquire[] statutory copyright protection under the 1909 Act,
3 as it was either never published with the requisite notice or registered as an
4 unpublished work.” *Id.* at 1062;
- 5 • The Superman material “appearing in *Action Comics* No. 4 is based almost
6 verbatim on Siegel’s pre-1938 script, . . . the Superman material appearing
7 therein was not a work for hire and is subject to termination” and therefore was
8 recaptured by Plaintiffs. *Id.* at 1063;
- 9 • *Superman* No. 1, pages three through six, was not a “work made for hire” and
10 was thus subject to termination and recaptured by Plaintiffs. *Id.* at 1064-65;
- 11 • “[T]he Superman material in *Action Comics* Nos. 2-3 and 5-6 . . . were works
12 made for hire.” *Id.* at 1067-68;
- 13 • “[T]he Superman materials created by Siegel and Shuster during the term of
14 their employment agreement (namely, *Action Comics* Nos. 7-61, and to
15 *Superman* Nos. 1-23) were works made for hire.” *Id.* at 1070;
- 16 • “[T]he two weeks’ worth of newspaper comic strip material created by Siegel
17 and Shuster during the spring of 1938, *before* the execution of the syndication
18 agreement were *not* works made for hire” and therefore were subject to
19 termination and recaptured by Plaintiffs. *Id.* at 1083 (emphasis in original);
- 20 • The failure to list the two weeks of newspaper strips in the Siegel Terminations
21 “was ‘harmless error’ that does not affect the validity of termination notice”
22 regarding these newspaper strips. *Id.* at 1095; and
- 23 • “[T]he newspaper strips created by Siegel and Shuster after September 22,
24 1938, were works made for hire, [and] the right to terminate does not reach the
25 grant to those works.” *Id.* at 1080.

26 As a result of these various rulings, Plaintiffs have recaptured Jerome Siegel’s
27 co-authorship interests in, and co-own with Defendant DC, the copyrights to the
28 following works: the first Superman story as published in *Action Comics*, No. 1,

1 *Action Comics, No. 4, Superman, No. 1* (pages three through six), and the first two
2 weeks of the Superman newspaper strips.⁴

3 Defendants filed a motion on October 2, 2009, seeking reconsideration of the
4 Court's ruling that the omission of the first two weeks of the Superman newspaper
5 strips from the Siegel Terminations was "harmless error." Plaintiffs filed a motion
6 on October 3, 2009, requesting reconsideration of the Court's ruling that the McClure
7 Superman newspaper strips created by Siegel and Shuster after September 22, 1938
8 were "works made for hire." In an opinion dated October 30, 2009, the Court denied
9 both sides' motions. *Siegel v. Warner Bros. Ent. Inc.*, 690 F. Supp. 2d 1048 (C.D.
10 Cal. 2009) ("*Siegel III*").

11 ARGUMENT

12 **I. F.R.C.P. 54(b) PERMITS A TRIAL COURT TO ENTER A FINAL** 13 **JUDGMENT AS TO ORDERS THAT DECIDE A CLAIM IF THERE IS** 14 **NO JUST REASON FOR DELAY**

15 Federal Rule of Civil Procedure 54(b) allows a district court to certify as final
16 and immediately appealable interlocutory orders that, like Judge Larson's Orders,
17 completely resolve certain outstanding claims in a case:

18 "When more than one claim for relief is presented in an action ... or when
19 multiple parties are involved, the court may direct the entry of a final judgment
20 as to one or more but fewer than all of the claims or parties only upon an
21 express determination that there is no just reason for delay and upon an express
22 direction for the entry of judgment."

23 Fed. R. Civ. P. 54(b). To be eligible for entry of judgment under Rule 54(b), the
24 order must constitute "an ultimate disposition of an individual claim entered in the
25 course of a multiple claims action," and there must be no just reason to delay
26 appellate review of the order until the conclusion of the entire case. *Curtiss-Wright*
27 *Corp. v. General Electric Co.*, 446 U.S. 1, 7-8 (1980).

28 ⁴ The Court declined to address the remaining Additional Issues that have been pending
before the Court since the parties briefed them in July of 2008, reserving decision on those
issues to a later date in advance of the accounting trial. *Siegel II*, 658 F. Supp. 2d at 1095,
n. 27. However, such Additional Issues relate to the procedural parameters of the
"accounting" phase of trial and not Plaintiffs' First Claim for relief.

1 In looking to see if appellate review should be delayed, courts “must take into
2 account judicial administrative interests as well as the equities involved.” *Curtiss-
3 Wright*, 446 U.S. at 9. Courts must weigh “such factors as whether the claims under
4 review were separable from the others remaining to be adjudicated and whether the
5 nature of the claims already determined was such that no appellate court would have
6 to decide the same issues more than once even if there were subsequent appeals.” *Id.*
7 at 8. The Ninth Circuit embraces a “pragmatic approach focusing on severability [of
8 claims] and efficient judicial administration.” *Continental Airlines, Inc. v. Goodyear
9 Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987).⁵

10 “[C]laims certified for appeal do not need to be separate and independent from
11 the remaining claims, so long as resolving the claims would ‘streamline the ensuing
12 litigation.’” *Noel v. Hall*, 568 F.3d 743, 747 (9th Cir. 2009) (citations omitted).
13 Courts have found no just reason for delay where a 54(b) judgment would avoid an
14 unnecessary and duplicative trial. *Continental Airlines, Inc.*, 819 F.2d at 1525
15 (“[G]iven the size and complexity of this case, we cannot condemn the district court’s
16 effort to carve out threshold claims and thus streamline further litigation.”); *Torres v.*
17 *City of Madera*, 655 F. Supp. 2d 1109, 1135 (E.D. Cal. 2009) (granting 54(b)
18 judgment where “if [the parties] were to wait until after trial to appeal the court’s
19 ruling, it would result in a second, duplicative and costly trial”); *Texaco, Inc. v.*
20 *Ponsoldt*, 939 F.2d 794, 797 (9th Cir. 1991) (“Rule 54(b) certification is proper if it
21 will aid ‘expeditious decision’ of the case.”).⁶

22
23 ⁵ Although the Ninth Circuit has not established a precise test to determine whether there is
24 just reason for delay, the factors to be considered include “whether the nature of the claims
25 already determined is such that no appellate court would have to decide the same issues
more than once, even if subsequent appeals are heard” and “whether immediate appellate
resolution will foster settlement of the remaining claims.” *Whitney v. Wurtz*, 2007 U.S.
Dist. LEXIS 60077, at *5 (N.D. Cal. Aug. 16, 2007).

26 ⁶ See also *Janos v. Wells Fargo Bank*, 2006 U.S. Dist. LEXIS 6758, at *22 (D. Ariz. Feb.
27 14, 2006) (granting 54(b) judgment where “an immediate appeal of this order would not
28 threaten duplication of judicial work through repetitive appeals on related issues or
transactions”); *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 16 (2d
Cir. 1997) (holding that a 54(b) judgment is appropriate “where an expensive and
duplicative trial could be avoided”); *Erwin v. U.S.*, 2008 U.S. Dist. LEXIS 21366 at *4, n.2
(M.D.N.C. 2008) (granting 54(b) judgment “in the interest of conserving judicial resources

1 The Ninth Circuit “reviews the certification of an appeal under Rule 54(b) for
2 abuse of discretion.” *Texaco, Inc.*, 939 F.2d at 797. As such, “issuance of a Rule
3 54(b) order is a fairly routine act that is reversed only in the rarest instances.” *James*
4 *v. Price Stern Sloan*, 283 F.3d 1064, 1068 n.11 (9th Cir. 2002).⁷

5
6 **II. THE COURT HAS DISPOSED OF THE FIRST CLAIM BY FINDING
THE SIEGELS’ SUPERMAN TERMINATION VALID**

7 The Court’s March 26, 2008 order unambiguously upheld the validity of the
8 Siegel Terminations as to *Action Comics, No. 1*, the first appearance of Superman,
9 thus disposing of Plaintiffs’ First Claim for Relief. In so doing, Judge Larson
10 carefully considered, addressed and dismissed each of Defendants’ alleged defenses
11 and counterclaims as to the validity of the Siegel Terminations. *Siegel* at 1131-40.
12 The Court’s order clearly amounts to an “ultimate disposition” of the Siegels’ First
13 Claim for Relief, and there exists no just reason to delay its appellate review. *Curtiss-*
14 *Wright*, 446 U.S. at 7-8.

15 **A. Entry of Judgment as to the First Claim Is Appropriate and Would**
16 **Streamline the Ensuing Litigation**

17 **1. The First Claim Is Severable from the Other, Complicated**
Accounting Claims

18 Plaintiffs’ First Claim is clearly “severable” from the remaining accounting
19 claims because it establishes the threshold issues of the validity and scope of the
20 Siegel Terminations.⁸ This claim is separate from Plaintiffs’ remaining Second,
21 Third, and Fourth claims, which seek an accounting of profits from the Superman
22 copyrights recaptured by the Siegel Terminations. The issues of the validity and

23 and preventing duplicative trials”). *See also Cadillac Fairview/California, Inc. v. United*
24 *States*, 41 F.3d 562, 564 (9th Cir. 1994) (entry of final judgment under Rule 54(b) is
appropriate, “even if subsequent trial proceedings might obviate the need for an appeal”).

25 ⁷ Courts routinely grant Rule 54(b) motions over the objections of an opposing party. *See,*
26 *e.g., Doe v. Univ. of California*, 1993 U.S. Dist. LEXIS 12876, at *5 (N.D. Cal. Sept. 2,
1993) (granting 54(b) judgment despite defendants’ opposition); *Angoss II Pshp. v. Trifox,*
27 *Inc.*, 2000 U.S. Dist. LEXIS 3165 (N.D. Cal. Mar. 10, 2000) (same).

28 ⁸ Similarly, the relevant portions of DC’s First, Second, Third, Fourth and Fifth
Counterclaims seek as a threshold matter to invalidate the terminations. *See Counterclaims,*
¶¶ 68-76, 90-113, 118-20, 132-35. The adjudication through appeal of Plaintiffs’ First
Claim would naturally implicate and resolve all such claims.

1 scope of the Siegel Terminations under the Copyright Act are distinct and severable
2 from the issue of how Defendants must account to Plaintiffs for profits from the
3 Superman copyrights recaptured and co-owned as of 1999 pursuant to the Siegel
4 Terminations. Whereas the former is governed by the Copyright Act, the latter is
5 governed by state-law accounting principles applicable to co-owners of property. *See*
6 *Zuill v. Shanahan*, 80 F.3d 1366, 1371 (9th Cir. 1996). The trier of fact will have to
7 determine the amount of post-termination Superman profits at issue; however, this
8 “accounting” analysis does not affect the validity and scope of the Siegel
9 Terminations. The Siegels could have well brought the First Claim alone, and sued
10 later if Defendants failed to properly account to them as co-owners of the recaptured
11 Superman copyrights. For this reason, *the Ninth Circuit would never have to decide*
12 *the validity and scope of the Siegel Terminations “more than once” if such issues*
13 *are now appealed*. Even if this Court’s determination of the “accounting” issues
14 were appealed, the validity and scope of the Siegel Terminations would already have
15 been finally resolved. *See City of St. Paul v. Evans*, 344 F.3d 1029, 1033, 1033 n.6
16 (9th Cir. 2003) (entering Rule 54(b) judgment on declaratory relief claim as to breach
17 of a valid agreement, while “not dispos[ing] of the remaining counterclaims”).

18 **2. The Interests of Judicial Economy and Streamlining This**
19 **Litigation Weigh Heavily in Favor of Finalizing the First**
20 **Claim Before Proceeding With the Accounting Trial**

21 Defendants can hardly claim that certification and appeal of the Court’s ruling
22 as to the validity and scope of the Siegel Terminations is unfair or prejudicial, as
23 Defendants will appeal this core ruling in any event as it is unfavorable to them. The
24 Siegel Terminations, as well as the mirror-image termination notice filed by the
25 Shuster Executor, have considerable impact on Defendants’ interests in Superman.
26 In fact, as of October 26, 2013, the effective date of the Shuster termination notice,
27 Defendants will be unable to produce new Superman derivative works without a new
28 license from the Siegels and the Shuster Executor of the recaptured Superman
copyrights. Accordingly, the core determination of the basic validity and scope of

1 the Siegel Terminations is a much more central economic concern to Defendants than
2 the particular outcome of the *Siegel* accounting trial. Defendants should therefore
3 welcome a final determination of such issues by the Ninth Circuit as soon as possible.

4 In both sides' estimation, substantial resources of both the Courts and the
5 parties will be required for the accounting trial. *See* Joint Status Report at 2. Entry
6 of judgment and an immediate appeal of the Court's rulings on the First Claim would
7 finally determine the scope of the Siegel Terminations, and the specific Superman
8 works for which an accounting is owed, resolve DC's related counterclaims and
9 defenses, and promote the speedy and efficient resolution of the accounting litigation
10 that depends on such threshold decisions. *See Noel v. Hall*, 568 F.3d at 747;
11 *Continental Airlines, Inc.*, 819 F.2d at 1525.

12 Courts routinely grant Rule 54(b) motions where it would streamline the
13 issues, conserve judicial resources and promote settlement. *See Texaco*, 939 F.2d at
14 798 (approving entry of judgment where "the legal issues now appealed will
15 streamline the ensuing litigation"). Entry of judgment on adjudicated claims under
16 Rule 54(b) is especially appropriate where, as set forth in Section II.B. below, the
17 claims determine the scope and contours of trial as to the remaining issues, that trial
18 is likely to be protracted, and the Court will avoid wasting precious resources in a re-
19 trial. *See Continental Airlines*, 819 F.2d at 1525 (approving Rule 54(b) entry of
20 judgment where "the district court effectively narrowed the issues, shortened any
21 subsequent trial by months, and efficiently separated the legal from the factual
22 questions"); *Adidas Am., Inc. v. Payless Shoesource, Inc.*, 166 Fed. Appx. 268, 270–
23 71 (9th Cir. 2006) (approving Rule 54(b) judgment where appellate reversal of partial
24 summary judgment after final resolution of the lawsuit would require a second trial).⁹

25
26 ⁹ *See also Torres*, 655 F. Supp. 2d at 1135 (E.D. Cal. 2009) (entering judgment under Rule
27 54(b) because "[a]llowing an appeal now would avoid the need for possibly two duplicative
28 trials" and "[t]his would conserve judicial resources and avoid the parties' expenditure of
vast resources on trying a case twice"); *Adams v. United States*, 2010 U.S. Dist. LEXIS
47509, at *12–13 (D. Idaho May 12, 2010) (entering judgment under Rule 54(b), as an
immediate appeal would "provide important appellate direction" for an upcoming trial, and
because "if an appeal must await the end of that trial, the immense efforts of Court and
counsel could be wasted if the appeal results in re-trial.").

1 **B. The Court’s “Work for Hire” Determinations Are Integral to the**
2 **First Claim and Have a Direct Effect on the Remaining Claims**

3 A “work made for hire” is not subject to the Copyright Act’s termination
4 provisions. 17 U.S.C. § 304(c). Judge Larson’s determinations as to which
5 Superman works were not “works for hire” is integral to Plaintiffs’ First Claim for
6 Relief and determined the copyrighted works successfully recaptured by the Siegel
7 Terminations (the “Recaptured Copyrights”). SAC, ¶¶ 39, 54, 83. Any errors in such
8 “work for hire” rulings and consequent determination of the Recaptured Copyrights
9 for which Defendants must account would directly impact and necessarily reverse the
10 second phase “accounting” trial, wasting this Court’s precious resources.

11 **1. The Court’s Contested Work for Hire Determinations**

12 In a series of exhaustively-analyzed published decisions, this Court decided the
13 fact-intensive question of which works listed in the Siegel Terminations, and within
14 the statutory termination “window” (1938-1943), were subject to successful recapture
15 by Plaintiffs, and which works were exempted from the Siegel Terminations as
16 “works made for hire.” *See Siegel I*, 542 F. Supp. 2d at 1126-30, *Siegel II*, 658 F.
17 Supp. 2d 1036, *Siegel III*, 690 F. Supp. 2d 1048.

18 In its initial summary judgment ruling, this Court held that the Siegels
19 successfully recaptured Jerome Siegel’s copyright interest in *Action Comics, No. 1*,
20 as it was not a “work for hire.” *Siegel I*, 542 F. Supp. 2d at 1126-30. Thereafter, the
21 Court, in its August 12, 2009 order, ruled which subsequent Superman works
22 published between 1938-1943 were recaptured by the Siegel Terminations, or were
23 exempt as “works made for hire.” *Siegel II*, 658 F. Supp. 2d 1036. The Court ruled
24 that the Siegels additionally recaptured *Action Comics, No. 4* (*id.* at 1062-63), pages
25 three through six of Superman No. 1 (*id.* at 1063-64), and the first two weeks of the
26 Superman newspaper strips (*id.* at 1080-84), but held that all the remaining works,
27 namely *Action Comics, Nos. 2, 3, 5, 6-61; Superman, Nos. 1-23* (*id.* at 1064-70); and
28 all the Superman newspaper strips created by Siegel and Shuster after September 22,

1 1938 were “works-made-for-hire,” and thus exempt from the Siegel Terminations.

2 As the Court has thoroughly analyzed and determined all of the Recaptured
3 Copyrights for which an accounting is owed, its rulings are sufficiently “final” to be
4 suitable for Rule 54(b) certification. *Curtiss-Wright*, 446 U.S. at 7-8.

5 Judge Larson’s “work for hire” rulings are contested by both sides, which each
6 filed motions for reconsideration that were denied. *See Siegel III*, 690 F. Supp. 2d
7 1048 (C.D. Cal. 2009). Plaintiffs contend that other than with respect to *Action*
8 *Comics, No. 1* and the first two weeks of the Superman newspaper strips, which were
9 clearly created “on spec,” the question of which subsequent Superman works were
10 “made for hire” presents multiple issues of material fact for the trier of fact, and
11 should not have been decided on summary judgment. *See Twentieth Century Fox*
12 *Film Corp. v. Entertainment Distrib.*, 429 F.3d 869, 874 (9th Cir. 2005) (reversing
13 grant of summary judgment as to work for hire under the 1909 Copyright Act as
14 inappropriate because “work for hire” disputes present genuine issues of material
15 fact); *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 206
16 F.3d 1322, 1330 (9th Cir. 2000) (holding summary judgment inappropriate for a
17 “work for hire” determination); 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* §
18 12.10[A] (the “questions of historical intent” and “as to the parties’ intent” inherent
19 in a “work for hire” determination are questions for the finder of fact). *See also*
20 *Mattel, Inc. v. MGA Entertainment, Inc.*, __ F.3d __, 2009 U.S. App. LEXIS 29187,
21 at *18, *33 (9th Cir. 2010) (reversing grant of summary judgment as “issue should
22 have been submitted to the jury” and noting that “the entire case will probably need
23 to be retried”).

24 Plaintiffs further contend that the Court erred in its application of the “work for
25 hire” doctrine to the post-September 22, 1938 Superman newspaper strips published
26 by the McClure Syndicate (the “Strips”). *See* Docket Nos. 569, 583. In fact, the
27 Court itself acknowledged in its order that such Strips were “on the outer boundaries
28 of what would constitute a work made for hire.” *Siegel II*, 658 F. Supp. at 1080.

1 This ruling alone affects approximately 1,100 daily Strips, and the first publication of
2 many valuable Superman elements. *Siegel III*, 690 F. Supp. 2d at 1069 n.11. Error
3 found in the Court’s exclusion of the Strips from the Recaptured Copyrights will
4 materially affect the accounting trial and require re-trial of the accounting claims.

5 Defendants, for their part, argued strenuously that the *first two weeks* of the
6 Superman Strips, which included Superman’s famous origin story on Krypton,
7 should have been *excluded* from the Recaptured Copyrights because such works were
8 not specifically listed in the Siegel Terminations, and Defendants argued that,
9 contrary to the Court’s opinion, this was not excusable “harmless error.” *See* Docket
10 Nos. 567, 585; *Siegel III*, 690 F. Supp. 2d at 1050-73.

11 Both sides filed extensive motions for reconsideration of the above “work for
12 hire” decisions, and it is clear from such motions that both sides intend to appeal such
13 decisions. *See* Docket Nos. 567, 569, 576-79, 583, 585-86, 588-89.

14 There is no good reason to delay this inevitable appeal. If the threshold
15 determination of the Recaptured Copyrights is incorrect, it follows that the subsidiary
16 determination of owed profits in the accounting trial will be erroneous, and the entire
17 time-consuming “accounting” trial would have to be re-tried. As set forth above, this
18 very real potential for duplicative trials weighs heavily in favor of certification. *See*
19 *Torres*, 655 F. Supp. 2d at 1135; *Adams*, 2010 U.S. Dist. LEXIS 47509, at *12–13.

20 Defendants can hardly claim that an appeal now of the Court’s threshold “work
21 for hire” decisions will prejudice them, as it is much more efficient to have such
22 appellate review *before* the parties expend significant resources mounting an
23 accounting trial, concerning thousands of derivative Superman products, that may
24 well be fatally flawed from the outset. Accordingly, the sooner the parties receive
25 guidance from the Ninth Circuit the better, as it would enable the accounting trial to
26 proceed on a much firmer footing.

27 ///

28 ///

1 **2. The Ninth Circuit’s Resolution of the Validity and Scope of**
2 **the Superman Terminations Will Promote Settlement**

3 Finally, a decision by the Ninth Circuit upholding the validity and scope of the
4 Siegel Terminations will provide certainty and thereby promote timely settlement of
5 this action *and* the closely related *DC Comics* action. *Curtiss-Wright Corp.*, 446 U.S.
6 at 8 n.2 (noting that a court, in deciding a 54(b) motion, should assess whether
7 “appellate resolution of the certified claims would facilitate a settlement of the
8 remainder of the claims.”).¹⁰ If the Ninth Circuit upholds the validity of the Siegel
9 Terminations, as expected, and determines the Superman copyrights recaptured, this
10 should also resolve the *DC Comics* action, as such deals with the Shuster Executor’s
11 twin notice of termination regarding the same Superman works by Siegel and
12 Shuster. Given the considerable value of the Superman copyrights in question, it is
13 far less likely that these cases will be settled at the trial court level. The Superman
14 case has dragged on for six long years. The Ninth Circuit’s input at this important
15 juncture will promote long-awaited settlement of the *entire* Superman dispute.

16 **C. Defendants’ Transparent Attempt to Re-Litigate These Issues in the**
17 **New Action Further Justifies an Immediate Appeal**

18 As noted above, the Siegel Terminations have been held valid as to the comic
19 books *Action Comics, Nos. 1, 4*, and portions of *Superman, No. 1*, as well as the first
20 two weeks of the *Superman* newspaper strips. These works comprise the essential
21 core of the Superman mythos, and include Superman’s origin on Krypton, his iconic
22 costume and super-powers, his “alter ego,” Clark Kent, and “their” relationship with
23 feisty reporter, Lois Lane. *Siegel I*, 542 F. Supp. 2d at 1126. Unhappy with having
24 to account to the Siegels for the use of these valuable Superman elements after April

25

¹⁰ *Whitney*, 2007 U.S. Dist. LEXIS 60077 at *5 (“A settlement before trial would obviate
26 the need for either trial on the merits or a subsequent appeal. Accordingly, this factor
27 weighs heavily in favor of certification.”); *Wood v. GCC Bend, LLC*, 422 F.3d 873, 882 n.6
28 (9th Cir. 2005) (“[A]s the Supreme Court suggested in *Curtiss-Wright*, in a proper case
settlement prospects might outweigh piecemeal appeal concerns.”); *Loral Fairchild Corp. v.*
Victor Co. of Japan, 931 F. Supp. 1044, 1047 (E.D.N.Y. 1996) (granting 54(b) motion in
part because “resolution of the decided [patent infringement] issues on appeal may facilitate
settlement with the remaining defendants”).

1 16, 1999 (the effective date of the Siegel Terminations), DC attempts to have this
2 Court ignore the previous six years of litigation in *Siegel*, by attacking the twin
3 Shuster Termination in the *DC Comics* case, on many of the same grounds on which
4 DC unsuccessfully attacked the Siegel Terminations in this case.

5 Aside from the point that DC is precluded from re-litigating these issues in the
6 new *DC Comics* action under the “law of the case” doctrine, it would in any event be
7 wholly inefficient for the parties and this Court to allow this litigation to “start over.”
8 *See* Defendant Marc Warren Peary, as Personal Representative of the Estate of
9 Joseph Shuster’s Motion to Dismiss and/or Stay Plaintiff’s Complaint Pursuant to
10 F.R.C.P. 12(b)(6), to be filed by August 13, 2010, at 19-25. As Siegel and Shuster
11 co-authored the Superman works in question, any decisions as to the validity and
12 scope of the Siegel Terminations (which, in turn, implicate decisions as to which
13 works are terminable because they are not “works for hire”) logically apply with
14 equal force to the Shuster Termination. *Id.*

15 Therefore, the entry of judgment pursuant to Rule 54(b) will also greatly
16 streamline the *DC Comics* action, as this Court’s prior rulings will thereby have
17 collateral estoppel effect in that closely related action. *See Brown v. Dunbar*, 2010
18 U.S. App. LEXIS 8160 (9th Cir. Apr. 20, 2010) (approving district “court’s orders
19 [that] found preclusive the partial final judgment under Federal Rule of Civil
20 Procedure 54(b)”).¹¹

21 With the *Siegel* case largely decided, DC’s *DC Comics* action cannot be used
22 as a vehicle to brush aside the past six years of hard-fought litigation at the expense
23 of considerable judicial resources, or as a de facto “appeal” at the *trial court* level.
24 The proper and most efficient forum for the immediate appeal DC seeks is not its
25 belated new complaint, but clearly the Ninth Circuit.

26 ///

27
28 ¹¹ *See also Continental Airlines, Inc.*, 819 F.2d at 1525 (“[A] 54(b) ruling in fact has res
judicata ramifications.”); *Flores v. Emerich & Fike*, 2008 U.S. Dist. LEXIS 49385, at *28-
29 (E.D. Cal. June 17, 2008) (where a court has “entered final judgment pursuant to Rule
54(b) ... there has been a final judgment” for preclusion purposes).

1 **III. IN LIGHT OF THESE ISSUES, THIS ACTION SHOULD BE STAYED**
2 **UNTIL RESOLUTION OF AN APPEAL**

3 As a general principle, a district court possesses the inherent power to control
4 its docket and promote efficient use of judicial resources. *See Dependable Highway*
5 *Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (“[T]he power
6 to stay proceedings is incidental to the power inherent in every court to control the
7 disposition of the causes on its docket with economy of time and effort for itself, for
8 counsel, and for litigants.”) (citing *Landis v. North American Co.*, 299 U.S. 248, 254-
9 55 (1936)); *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863-64 (9th
10 Cir. 1979) (“A trial court may, with propriety, find it is efficient for its own docket
11 and the fairest course for the parties to enter a stay of an action before it, pending
12 resolution of independent proceedings which bear upon the case.”).

13 “If a district court certifies claims for appeal pursuant to Rule 54(b), it should
14 stay all proceedings on the remaining claims if the interests of efficiency and fairness
15 are served by doing so.” *Doe*, 1993 U.S. Dist. LEXIS 12876, at *5 (citation omitted).
16 *See also Matek v. Murat*, 862 F.2d 720, 732 n.18 (9th Cir. 1988) (affirming stay of
17 proceedings after entry of judgment under Rule 54(b) pending the appeal); *Roe v.*
18 *City of Spokane*, 2008 U.S. Dist. LEXIS 82528, at *17-18 (E.D. Wash. Oct. 16,
19 2008) (granting entry of judgment under Rule 54(b) and a stay, where holding a trial
20 could “waste judicial resources as well as the resources of the parties and their
21 counsel”); *De Aguilar v. AMTRAK*, 2006 U.S. Dist. LEXIS 11187, at *9–11 (E.D.
22 Cal. March 2, 2006) (staying proceedings after entry of judgment under Rule 54(b)
23 pending the appeal).

24 As both the validity and scope of the Siegel Terminations, and the specific
25 copyrights thereby recaptured, control the results in the pending “accounting” trial,
26 this Court should exercise its discretion to stay this action until the appeal of such
27 underlying issues is complete.

28 ///

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for entry of a partial final judgment under F.R.C.P. 54(b) should be granted in its entirety.

DATED: August 12, 2010 TOBEROFF & ASSOCIATES, P.C.

By



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